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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1307

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Everett L. Turpin, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri, *in Banc*, against him on January 10, 1966, in the case of *Everett L. Turpin* v. *Chicago, Burlington & Quincy Railroad Company, a Corporation*, Number 51,026, brought and tried under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, *et seq.*

(a) OPINIONS BELOW

(References are to the machine page numbers on the outside lower corner)

No opinion was filed by the trial court. A copy of its judgment appears in the Appendix hereto as Exhibit D, p. A33.

The unanimous opinion of Division Number One of the Supreme Court of Missouri, filed on April 12, 1965, reversing the judgment of the trial court entering judgment for defendant *non obstante veredicto* and remanding the case for new trial was not published as the case was thereafter transferred to the Court, *in Banc,* of the Court's own Motion (R. 366). A true copy of said opinion is set out in full in the record at pages 327 to 340 and in the Appendix at pages A1 to A14 (Exh. A).

The unanimous opinion of the Supreme Court of Missouri, *in Banc,* filed January 10, 1966, affirming the judgment of the trial court for defendant *non obstante veredicto* is not yet reported but is set out in full at pages 369 to 384 of the record and in the Appendix at pages A15 to A33 (Exh. C).

(b) JURISDICTION

(i) The judgment of the trial Court for defendant *non obstante veredicto* was entered on August 14, 1964. (R. 319)

The judgment of the Supreme Court of Missouri, *in Banc,* was dated and entered January 10, 1966. (R. 368, Exh. B)

(ii) The order of the Supreme Court of Missouri, *in Banc,* denying appellant's motion for rehearing was entered on February 14, 1966. (R. 399)

The Supreme Court of Missouri, *in Banc,* is the highest Court of Appellate Jurisdiction in the State of Missouri. Missouri Constitution, 1945, Sections 2 and 7. Petitioner has no further remedy by appellate review in the State Courts of Missouri.

An order was entered on February 28, 1966, by the Supreme Court of Missouri, *in Banc,* staying all further proceedings for a period of 90 days from February 14, 1966, to enable petitioner to apply to this Court for a writ of certiorari herein. (R. 403, Exh. E, p. A34)

(iii) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), the pertinent parts of which are:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Jurisdiction is also invoked under the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Sec. 51, *et seq.,* as this action was specifically brought and tried under the provisions of such Act.

The following cases are believed to sustain the jurisdiction of this Court: *Ward* v. *Atlantic Coast Line R. Co.,* 362 U.S. 396, 80 S. Ct. 789; *Dennis* v. *The Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S. Ct. 291;

Gallick v. *The Baltimore and Ohio Railroad Company*, 372 U.S. 108, 83 S. Ct. 659; *Senko* v. *La Crosse Dredging Corporation*, 352 U.S. 370, 371-372, 374, 77 S. Ct. 415, 416, 417; *Basham* v. *Pennsylvania Railroad Company*, 372 U.S. 699, 83 S. Ct. 965.

(c) QUESTIONS PRESENTED FOR REVIEW

It being admitted by the defendant's answer (R. 14) that at the time in question, petitioner was engaged in duties in connection with loading trucks piggy-back on defendant's Railroad car located in the railroad yards of defendant in North Kansas City, Missouri, and the cars and trucks being loaded thereon were engaged in interstate commerce, but it being denied that petitioner was under any supervision of defendant or of its agents or employees, the questions presented for review are:

First: Whether the Supreme Court of Missouri erred in holding the rule in Federal Employers' Liability Act cases that any evidence "even the slightest" will make a jury issue is limited to issues of negligence only and may not be applied to the issue of employment or employee status of this petitioner and thereby brought its opinion into conflict with controlling decisions of this and other Federal Appellate Courts?

Second: Whether the Missouri Supreme Court erred in holding the evidence in this case was insufficient to make a jury issue on whether petitioner was an employee of Railroad and thereby brought its opinion into direct conflict with controlling decisions of the Court and the United States Courts of Appeals in similar cases?

Third: Whether the Missouri Supreme Court erred in holding the evidence in this case was insufficient to

make a jury issue on whether Railroad's wholly owned subsidiary Burlington Truck Lines, Inc., had independent existence in form only and was not in fact an operating division of Railroad in corporate form completely dominated and controlled by its parent Railroad and thereby brought its opinion into direct conflict with controlling decisions of this Court and the United States Courts of Appeals in similar cases?

Fourth: Whether the evidence does not make a jury issue on whether the organization and manner of operation by Railroad of its wholly owned and controlled subsidiary or operational division was not a device to enable Railroad as a common carrier by Railroad to exempt itself from any liability under the provisions of the Federal Employers' Liability Act?

(d) STATUTORY PROVISIONS INVOLVED

28 U. S. Code Annotated, Sec. 1257:

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

45 U. S. Code Annotated, Sec. 51:

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or territories, or between the District of Columbia and any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of

this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

45 U. S. Code Annotated, Sec. 55:

"§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66."

(e) STATEMENT OF FACTS

(Chicago, Burlington & Quincy Railroad Company is referred to herein as "Railroad" and Burlington Truck Lines, Inc., is referred to as "Truck Lines." The opinion of the Supreme Court of Missouri, *in Banc,* is referred to as *"Banc* Op.")

A total of twelve jurors (R. 312), four Judges and three Commissioners of Division No. 1 of the Supreme Court of Missouri (R. 325-341; Exh. A) have held that the evidence justifies with reason a verdict for plaintiff, although on rehearing before the Missouri Supreme Court, *in Banc,* the four Judges of Division No. 1 reversed them-

selves and joined with the other three Judges of the Court, *in Banc*, in a unanimous decision to the contrary. (R. 369-384, Exh. C)

From the evidence adduced at the trial, the jury could have reasonably, and apparently did, conclude that plaintiff's primary employer, Burlington Truck Lines, Inc., was a wholly-owned and dominated subsidiary of respondent, Chicago, Burlington & Quincy Railroad Company. (R. 31, 237, *Banc* Op., Exh. C, p. A16)

Truck Lines was dominated by officials of Railroad manning key positions in the Truck Line organization as follows:

J. J. Alms, Executive Assistant to the President of Railroad was President of Truck Lines. (R. 42, 43, 244, 290)

A. D. McLane, Secretary of Railroad was Secretary and Assistant Treasurer of Truck Lines. (R. 42, Trial Exhs. 9, 10)

R. W. Coglan was Treasurer of Railroad and Treasurer and Assistant Secretary of Truck Lines. (R. 42, Trial Exhs. 9, 10)

Eldon Martin was Vice-President and General Counsel of Railroad and a Director and General Counsel of Truck Lines. (R. 43, 244, Trial Exh. 9)

F. E. Sperry was Assistant Vice-President in the Operating Department of Railroad and a Director of Truck Lines. (R. 43, 243, Trial Exh. 9)

R. C. Smith was Comptroller of Railroad and a Director of Truck Lines. (R. 43, 244, 290, Trial Exh. 9)

G. R. Glover was Vice-President of Traffic for Railroad and a Director of Truck Lines. (R. 43, 244, Trial Exh. 9)

Defendant Railroad was the owner, builder, maintainer and operator of a large railroad terminal and freight house and the loading and unloading ramps and catwalks connected therewith in North Kansas City, Missouri, where plaintiff was working at the time of his injury. (R. 32, 27, 273, *Banc* Op., Exh. C, pp. A17-A18)

That in accordance with admissions in defendant's First Amended Answer "on March eleventh, 1961 (the date of plaintiff's injury) plaintiff was engaged in various duties in the employ of the truck line in connection with the loading trucks, piggy-back, on defendant's railroad car located in the railroad yards of defendant in North Kansas City, Missouri, and there was a ramp running alongside of the track and cars at said time and place, and that said cars and the trucks being located thereon were engaged in interstate commerce." (R. 14, 27-28, 31, 32, *Banc* Op., Exh. C, pp. A16-A19) The trailers being loaded by plaintiff were scheduled to move by train over the Burlington Railroad. (R. 79, 80)

Truck Lines was a tenant of Railroad with its general headquarters in the terminal and freight house in North Kansas City, which was not divided between them, and the two jointly occupied and used all the space and facilities in common. (R. 143, 228, 229, 239, 240, 241, 260, 262, *Banc* Op., Exh. C, p. A17)

Railroad was engaged in the so-called "piggy-back" hauling of highway trailers, loaded and unloaded, on railway flatcars in railroad transportation. (R. 231, 232, 260, 262, *Banc* Op., Exh. C, p. A17)

Railroad owned some highway trailers, but no tractors or motive equipment for use in loading or unloading from railroad cars. (R. 241, 266, 268, *Banc* Op., Exh. C, p. A17)

Truck Lines owned highway trailers and also tractors and motive equipment, some of which had special equipment for loading and unloading trailers. (R. 231, 232, *Banc* Op., Exh. C, p. A17)

The trailers of both Railroad and Truck Lines were kept in a common pool for common use in service to the trade. (R. 244, 245) Both used the name "Burlington" indiscriminatorily on their respective trailers. (R. 244, 245)

While Truck Lines kept its finances separate, billed Railroad for services to it and paid Railroad for rents and services furnished by Railroad (R. 227, *Banc* Op., Exh. C, p. A16), the two companies had the same General Counsel (R. 236, 237, 242); both used the Railroad's Claim Department (R. 229, 230, 241, 242, 243, 244); both used the Railroad's Law Department except for local matters (R. 242, 241, 229); other than local doctors, Truck Lines used the doctors and medical department of Railroad (R. 230, 35, 36, 62, 63, 229); both used the same special agents or detectives. (R. 262, 240, 241, 230) Railroad as sole stockholder of Truck Lines receives no dividends from Truck Line operations—any available money is used for equipment and expansion. (R. 239)

While having no formal contract with Truck Lines Railroad did have formal contracts with other truckers doing similar work for it. (R. 286)

Railroad and Truck Lines issued coordinated rail bills and truck bills carried under bill-of-lading on Railroad. (R. 231, 80, 81, 287)

Railroad issued free passes to Truck Line employees on occasion, including plaintiff, but issued no such passes to employees of other companies rendering similar service for Railroad. (R. 141, 142, 269, 270, 279, 280, *Banc* Op., Exh. C, p. A22)

Part of the tools used by plaintiff and other employees of Truck Lines in loading and unloading trailers in the piggy-back service at Railroad's Terminal were furnished by Railroad. (R. 189, 190, 207, 186, 205, 208, *Banc* Op., Exh. C, pp. A20-A22)

Railroad furnished a caterpillar tractor for use in pulling tractors and trailers out of mud holes on its premises. (R. 208, 180, 194, 195, 196, 112, *Banc* Op., Exh. C, p. A21)

The evidence shows the following acts of control of Truck Lines employees by Railroad officials and supervisors:

Railroad inspectors and switch crews maintained inspection of the railroad cars as to their condition for loading and also as to whether they were properly loaded, and gave plaintiff and other Truck Line employees instructions as to such matters which had to be obeyed. (R. 84, 85, 86, 118, 120, 121, 110, 185, 182, 183, 205, *Banc* Op., Exh. C, p. A20)

Railroad Rip Track Foreman, Ned Vincent, frequently gave employees directions as to how the piggy-back cars were to be unloaded. (R. 185, 186, *Banc* Op. Exh. C, p. A20)

Mr. Frank West, Roadmaster of Railroad, directed Truck Lines employees to use the Railroad's caterpillar tractor to move trailers in the piggy-back operation. (R. 181, 195, 196, 180, *Banc* Op., Exh. C, p. A21)

Mr. West and Railroad Superintendent (name not shown) once directed Truck Lines employees in loading a highway matting onto a piggy-back car. (R. 181, 182)

Railroad notified Truck Lines when piggy-back cars would arrive and where they would be set for unloading. (R. 123, 134) Following a wreck at Orrick, Truck Line employees unloaded a number of cars involved in the wreck—both flat cars and piggy-back cars—under directions of Railroad Roadmaster West, Railroad Superin-

tendent (name not given) and Truck Lines Manager Cooper. (R. 184, 185, *Banc* Op., Exh. C, p. A22)

In the latter part of 1957 or 1958, Railroad had a large shipment of about 45 cars of flour to be loaded for shipment overseas within a day. Railroad Superintendent, Railroad Roadmaster West, and other railroad men directed and instructed Truck Lines employees in loading these cars. (R. 198, 199, 202, 203, 204, *Banc* Op., Exh. C, pp. A21-A22)

SUMMARY

Plaintiff's primary employer, Truck Lines, was a wholly-owned subsidiary of Railroad controlled through officials of the railroad manning key positions in Truck Lines; the work being done was part of Railroad's general business and at the time plaintiff was engaged in furthering the operational activities of Railroad; the terminal, ramps and catwalk where plaintiff was working were all owned, in possession of and operated by Railroad; a caterpillar tractor and certain small tools were furnished by Railroad for use by Truck Lines employees; the piggy-back car plaintiff was helping unload belonged to Railroad; Railroad and Truck Lines used Railroad's terminal in common and without division of quarters; Railroad and Truck Lines used the same claim service, same Legal Department, same Medical Department, same detective service, had common officers in part and had the same General Counsel; employees of Truck Lines loaded and unloaded piggy-back cars as directed by Railroad and under the supervision of Railroad supervisors, switch crews, riptrack foreman, superintendent and roadmaster. Upon emergency or unusual situations Railroad officials took charge and directed the activities of Truck Lines employees demonstrating Railroad had the right of control and exercised that right whenever desired.

(f) MANNER OF RAISING FEDERAL QUESTION

In his petition based on the Federal Employers' Liability Act, petitioner alleged he was an employee of Truck Lines, a wholly owned subsidiary of Railroad, an interstate carrier, and at the times mentioned in evidence was under the general supervision of defendant Railroad and was at the time loading trucks piggy-back on defendant's railroad car in defendant's railroad yards and was using defendant's ramp in furtherance of interstate transportation and commerce. (R. 10-11)

In its amended answer on which the case was tried, defendant Railroad denied petitioner was ever its employee but was an employee of Truck Lines and not of Railroad and denied that petitioner was ever at any time under the supervision of defendant Railroad or its agents or employees. (R. 5-6)

At the close of plaintiff's evidence, defendant Railroad moved for a directed verdict on the sole ground that plaintiff failed to prove that he was an employee of defendant Railroad at the time of his injury. (R. 221)

At the close of all the evidence, defendant Railroad renewed its motion for a directed verdict on the same ground. (R. 299)

Following the verdict for plaintiff, defendant Railroad filed its motion for judgment or in the alternative for new trial renewing its charge that plaintiff had not proved he was an employee of defendant Railroad. (Par. I(a) of said Motion, R. 313)

The trial Court sustained defendant's motion for judgment on the sole ground plaintiff had failed to prove he was an employee of defendant within the meaning of the Federal Employers' Liability Act. (R. 319)

The Supreme Court of Missouri affirmed the judgment of the trial Court on the ground plaintiff had failed to prove he was an employee of defendant Railroad within the meaning of the Federal Employers' Liability Act. (R. 372-384)

Petitioner assigned error in that regard as a ground for his motion for a rehearing before the Missouri Supreme Court, *in Banc.* (R. 386-394). Petitioner's motion was overruled. (R. 399)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

The Supreme Court of Missouri Erred in Holding the Rule in Federal Employers Liability Cases That Any Evidence "Even the Slightest" Will Make a Jury Issue Is Limited to Issues of Negligence Only and May Not Be Applied to the Issue of Employment or Employee Status.

In attempting to distinguish cases of this Court applying the above rule of evidence in Federal Employers Liability cases, the Supreme Court of Missouri stated (R 376, Exh. C, p. A23):

> "Those cases all involved issues of negligence or proximate cause under FELA, and it was to the proof on those questions that the remarks relied upon by plaintiff were directed. On the other hand, it seems clear that the burden of proving employment by the defendant in FELA cases is on the plaintiff, that this question is to be determined under general law (general federal law, if there is a difference), and that the terms 'employer' and 'employee' are used in the act in their usual and natural sense."

Having started off on the wrong legal standard, the Missouri Supreme Court proceeded to state the facts favorable to the defendant's viewpoint and to draw the inferences in favor of defendant and against the jury verdict in favor of plaintiff.

Railroad cites no decisions of this Court or any other Court holding this rule in FELA cases is limited to negligence issues and may not be applied to issues of employment or employee status.

Cases directly in point to the contrary are found in cases under the Jones Act, 46 U.S.C.A., Sec. 688, wherein it is provided:

> "* * * and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

In the case of *Dixon* v. *Serodino, Inc.*, 6 Cir., 331 F.2d 668, the Court in ruling a case under the Jones Act said (l.c. 673):

> "Substantive Federal law controls Jones Act litigation, which in turn is governed in general by the rules and decisions which enforce the Federal Employers Liability Act, Title 45, U.S.C.A. § 51 et seq. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S. Ct. 459, 1 L. Ed. 2d 515; De Lima v. Trinidad Corporation, 302 F. 2d 585, 588 (C.A. 2, 1962); Urie v. Thompson, 337 U.S. 163, 172, 69 S. Ct. 1018, 93 L. Ed. 1282."

The question of employment or employee status involves the merits and therefore substantive law. *Nelson* v. *Green Line Streamers*, 6 Cir., 255 F.2d 31, 34.

In the case of *Senko* v. *La Crosse Dredging Corporation*, 352 U.S. 370, 371-372, 374, 77 S. Ct. 415, the Court,

in ruling a seaman case, stated the law as follows (l.c. 416):

> "In South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732, we said that whether or not an employee is ' "a member of a crew" turns on questions of fact' and that, if a finding on this question has evidence to support it, the finding is conclusive. Id., 309 U.S. at pages 257-258, 60 S. Ct. at pages 547-548. The sole question presented here, therefore, is whether there is an evidentiary basis for the jury's finding that petitioner was a member of a crew at the time of his injury. This finding was made under specific instructions not objected to here."

(l.c. 417:)

> "We believe, however, that our decision in South Chicago Coal & Dock Co. v. Bassett, supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In the case of *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U.S. 355, 360, 82 S. Ct. 780, 784, in a case under the Longshoremen's Act, this Court pointed out that in that case, the plaintiff had "the right to trial by jury. As in cases under the Jones Act * * * and under the Federal Employers' Liability Act * * *." In support of that statement, the Court cited the case of *Rogers* v. *Missouri Pac. R. Co.,* 252 U.S. 500, 77 S. Ct. 443, and other FELA cases, thereby indicating applicability of the same rules in FELA and Jones Act cases.

In the case of *Adams* v. *Kelly Drilling Co.*, 5 Cir., 273 F.2d 887, in a case under the Jones Act involving the status of plaintiff as an employee, there was a jury verdict for defendant and plaintiff appealed. In affirming the judgment, the Court there said (l.c. 889):

> "In addition, plaintiff contends that reasonable minds could not fail, under applicable law, to conclude that he was a seaman and member of a crew of a vessel, and that the judgment must be reversed and here rendered for him.
>
> "On their part, the appellees, pointing out that it is the province of the jury to determine, whether a person is a seaman and a member of the crew of a vessel under the Jones Act and for the purpose of recovering under the warranty of seaworthiness, argues that the jury's decision is final, if there is evidence to support it, whether or not the district or appellate court agrees with the jury's conclusion, cases note 2, supra, and that even the slightest evidence is sufficient to support a verdict. Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 507, 77 S. Ct. 443, 1 L. Ed. 2d 493; Offshore Co. v. Robison, note 2, supra."

(l.c. 890:)

> "We agree with appellees that at least in the present state of the decisions, the issues in the case were for the jury and the evidence did not demand, indeed it did not permit, the direction of a verdict for either plaintiff or defendant."

In the case of *Offshore Company* v. *Robison*, 5 Cir., 266 F.2d 769, in a case under the Jones Act in affirming a jury verdict for plaintiff, the Court said (l.c. 773):

> "[1] There are two aspects to the question at issue: (1) What is required in law to constitute a maritime worker a seaman and a member of a crew? (2) In the circumstances of this case, is the question one for the court or for the jury?"

(l.c. 780:)

> "[7] Under the Jones Act, judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the claimant was a seaman, a member of a crew of a vessel. In the recent case of Rogers v. Missouri Pacific R. Co., 1957, 352 U.S. 500, 507, 77 S. Ct. 443, 448, 1 L. Ed. 2d 493, in an analogous situation, the Supreme Court stated that under the FELA 'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought'. Even if the test were *substantial supporting evidence,* on the record as it comes to us, we would have to hold that there was a sufficient evidentiary basis for the trial court to submit the case to the jury."
>
> * * *
>
> "There is no reason for lamentations. Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act."

That case recognizes the FELA Rogers case as authority in Jones Act cases.

In the case of *Keymon* v. *Tennessee Towing Co.,* 6 Cir., 296 F.2d 784, in a Jones Act case in affirming a jury verdict for plaintiff, the Court said (l.c. 786):

> "It is thoroughly established that the Jones Act must be liberally construed as remedial legislation for the benefit and protection of seamen. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265; Wilkes v. Mississippi Sand & Gravel Co., 202 F.2d

383, 387 (C.A. 6); Offshore Co. v. Robison, 266 F.2d 769, 774, 75 A.L.R. 2d 1296 (C.A. 5)."

* * *

"The Supreme Court of the United States has been vigorous in reversing decisions which take away from the jury cases in Jones Act proceedings, and in holding that whether a particular plaintiff is entitled to the protection of the Jones Act is a jury issue under the circumstances of each case. Gianfala v. Texas Co., 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775; Butler v. Whiteman, 356 U.S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754; Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129, 80 S. Ct. 247, 4 L. Ed. 2d 191; Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404; and Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 78 S. Ct. 687, 2 L. Ed. 2d 737."

"[4] Under the foregoing authorities, we think there was substantial evidence to support the finding of the jury in the present case that the plaintiff-appellee was, at the time he received his injuries, a seaman within the meaning of the Jones Act."

That is in line with the Rogers case showing similar vigilance of this Court in FELA cases.

See to like effect, *Mach* v. *Pennsylvania Railroad Co.*, 3 Cir., 317 F.2d 761, 763 (2). *Bernardo* v. *Bethlehem Steel Co.*, 2 Cir., 314 F.2d 604, 608 (2).

In the case of *Ratigan* v. *New York Central Railroad Co.*, 2 Cir., 291 F.2d 548, the Court said (l.c. 553):

"The law applicable to this phase of the case is federal law and the Supreme Court has told us in various ways and on numerous occasions that in these FELA cases the railroad employee is to be given the benefit of every doubt. (citing thirteen cases)."

See to like effect *Kodak* v. *Long Island Railroad Company*, 2 Cir., 342 F.2d 244, 247 (2).

The leading case with which we believe this opinion of the Supreme Court of Missouri comes into direct conflict is likewise a Missouri case: *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506, 507, 509, 510, 77 S. Ct. 443. In that case, the issue was that of proximate cause while here it is that of employee status or employment. We believe the above cases have demonstrated the same rule as to admeasuring the evidence necessary to make a jury issue on the question of negligence applied to employee status.

In that case, the Supreme Court of Missouri erroneously applied the wrong standard. This Court there said (77 S. Ct., l.c. 448):

> "The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.

"[6-8] Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

(l.c. 449:)

"[9, 10] The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

(l.c. 450:)

"[11-16] Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury

determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. Similarly, once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case.

"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

II

The Missouri Supreme Court Erred in Holding the Evidence in This Case Was Insufficient to Make a Jury Issue on Whether Plaintiff Was an Employee of Railroad and Thereby Brought Its Opinion into Direct Conflict with Controlling Decisions of This Court and the United States Courts of Appeals in Similar Cases.

In the case of *Reed* v. *Pennsylvania Railroad Company,* 351 U.S. 502, 76 S. Ct. 958, the Court in a FELA case stated (l.c. 961):

> "[8-10] We think that the present petitioner is employed by the respondent in interstate commerce within the meaning of the 1939 amendment to § 1. Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage. Under the amendment, it is the 'duties' of the employee that must further or affect commerce, and it is enough if 'any part' of those duties has the requisite effect. The statute commands us to examine the purpose and effect of the employee's function in the railroad's interstate operation, without limitation to nonclerical employees or determination on the basis of the employee's importance as an individual in the railroad's organization."

In the case of *Eresafe* v. *New York, New Haven & Hartford R. Co.,* 2 Cir., 250 F.2d 619, in a case brought under the Federal Employers' Liability Act, the Court said (l.c. 621:)

> "The Act should be liberally construed in favor of the employee. It is remedial legislation."

The evidence here clearly justified the jury in finding that plaintiff at the time of his injury was performing the work of Railroad in loading Railroad's piggy-back car on Railroad's premises for shipment over Railroad's tracks.

In the case of *Byrne* v. *Pennsylvania Railroad Company*, 3 Cir., 262 F.2d 906, the Court, in affirming a jury verdict for plaintiff in a FELA case, said (l.c. 908):

> "It is clear that at the time of his death Irby, an electrical engineer, thirty-two years old, was an employee of Westinghouse Electric Corporation. He was killed while working on one of four electric locomotives, built by Westinghouse and purchased from Westinghouse by the defendant, the Pennsylvania Railroad Company. The locomotive in which Irby was killed was in the car shops of the Railroad at Wilmington, Delaware."

(l.c. 910:)

> "There is, of course, no question but that Irby was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that Irby was also an employee of the Railroad."
>
> * * *
>
> "The designation of a vendor's employee to work with the vended equipment on the vendee's premises does not necessarily establish an employment relationship between the vendee and the employee assigned by the vendor. On the other hand a vendee may not make use of that employee, having him 'do its work' and exercising the 'right to control' him, accompanied by other incidents usually connected with employment, and escape the responsibility imposed by the federal statute. The evidence as to Irby's employment looks two ways and it is impossible indeed to draw a line of demarcation between the work Irby performed for Westinghouse and that which he did for the Railroad. The evidence would support the conclusion that

he was, to some extent at least, a common employee of both.

"[2] This issue became one for the jury." (l.c. 911:)

"In the Shaw opinion at the page indicated we also said in footnote 4, cited to the text of that opinion: 'Whose work is being done seems to have been the most important factor in Supreme Court decisions in somewhat similar cases', citing Linstead v. Chesapeake & Ohio Ry., 1928, 276 U.S. 28, 48 S. Ct. 241, 72 L. Ed. 453, and Hull v. Philadelphia & Reading Ry. Co., 1920, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670."

(l.c. 912:)

"[6, 7] The jury was entitled to find the foregoing as facts and to conclude that the Railroad had a right of control over Irby and that he was engaged in maintaining its services, i. e. doing its work. Cf. Reed v. Pennsylvania R. R. Co., 1956, 351 U.S. 502, 76 S. Ct. 958, 100 L. Ed. 1366. The jury was entitled to reconcile the operative facts if it could do so, and attribute such weight as it desired to particular incidents and to find under a proper charge that Irby was an employee of the Railroad. Ellis v. Union Pac. R. R. Co., 1947, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; Lavender v. Kurn, 1946, 327 U.S. 645, 6 S. Ct. 740, 90 L. Ed. 916.

"It is clear that the court below did not err in submitting the issue of whether Irby was employed by the Railroad to the jury."

In the case of *Armit* v. *Loveland,* 3 Cir., 115 F.2d 308, in a Jones Act case, the Court said (l.c. 314):

"The fact that the plaintiff was employed on the 'Hoodless' at the time of his injury is not in dispute, and it was possible for him to have more than one employer. Restatement of the Law, Agency, § 226. If the defendants so scrambled their relations as to render

it difficult for anyone to say for a certainty whether the plaintiff was employed by only one or by all of them that should not serve to defeat the plaintiff's right by relieving a responsible defendant. To hold otherwise would be to put a premium upon the confusion which the defendants themselves created. The ones responsible for it should be the ones to dispel it, which they can do by adjusting their respective liabilities inter se. In the circumstances here present, we can see no legal necessity for requiring the plaintiff to grope around in search of his employer's identity among corporate entities and individuals, all of whom are shoots off the same stock and engaged in a common activity. A verdict against all three defendants was warranted. Lang et al. v. Hanlon et al., 302 Pa. 173, 178, 153 A. 143."

Division No. 1 of the Missouri Supreme Court upon the first hearing on appeal wrote an opinion stating facts favorable to plaintiff as shown in the record and drawing inference favorable to plaintiff and unanimously reversed the judgment for defendant *non obstante veredicto* and affirmed the order for a new trial.

We submit the later opinion of the Supreme Court of Missouri, *in Banc,* emphasizing the facts favorable to defendant, minimizing the facts favorable to plaintiff and drawing all inferences against plaintiff is in direct conflict with the opinion of this Court in the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, where the Court stated the law as follows (l.c. 412):

"[6-8] It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the

contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S. Ct. 451, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

See to like effect *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U.S. 108, 115, 83 S. Ct. 659, 664.

We submit the opinion of the Missouri Supreme Court, *in Banc*, in this case is in direct conflict with the case of *Cimorelli* v. *New York Cent. R. Co.*, 6 Cir., 148 F.2d 575, under similar facts ruling to the contrary.

The Cimorelli case was cited with approval in *Ward* v. *Atlantic Coast Line R. Co.*, 362 U.S. 396, 400, 80 S. Ct. 789, 792 and adopted and followed in the case of *Baker* v. *Texas and Pacific Railway Co.*, 359 U.S. 227, 228, 229, 79 S. Ct. 664.

The Baker case involved an employee of an independent contractor engaged in doing work on the roadbed to strengthen it. The State Courts of Texas held petitioner was not an employee of defendant Railway as a matter of law. In reversing the judgment, this Court said (79 S. Ct., l.c. 665):

"[2-5] The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, 35 S. Ct. 491, 494, 59 L. Ed. 849, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves at matters of federal law under the Act. See Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28, 33-34, 48 S. Ct. 241, 243, 72 L. Ed. 453. It has been well said of the question that '[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative.' Cimorelli v. New York Central R. Co., 6 Cir., 148 F.2d 575, 577. Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, § 220, comment *c*; 227, comment *a*. Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. See Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the material to be pumped into the roadbed; and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture. The railroad introduced evidence tending to controvert this and further evidence tending to show that an employment relationship did not exist between it and Baker at the time of the accident. An issue for determination by the jury was presented. 'The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that

which it considers most reasonable.' Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520."

We submit the work of petitioner herein in loading defendant's piggy-back car, standing on defendant's track at defendant's dock for shipment interstate over Railroad's lines was activity in furtherance of Railroad's business operation and was work done to further the task of Railroad's enterprise just as much as work improving the track in the Baker case. We submit the distinction between this case and the Baker case attempted to be made by the Missouri Supreme Court is invalid and that the opinion of that Court herein is in direct and irreconcilable conflict with the opinion of this Court in the Baker case.

We submit the opinion of the Missouri Supreme Court herein is likewise and for the same reason in direct conflict with the opinion of this Court in the case of *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 78 S. Ct. 758, and the case of *Ward* v. *Atlantic Coast Line R. Co., supra.*

III

The Missouri Supreme Court Erred in Holding the Evidence in This Case Was Insufficient to Make a Jury Issue on Whether Railroad's Wholly Owned Subsidiary Burlington Truck Lines, Inc., Had Independent Existence in Form Only and Was Not in Fact Merely an Operating Division of Railroad in Corporate Form Completely Dominated and Controlled by Its Parent Railroad.

In the case of *Bowater Steamship Company* v. *Patterson*, 2 Cir., 303 F.2d 369, the Court in a labor case involving shipping said (l.c. 372):

"Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo,*' Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. Contrast Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 37 S. Ct. 506, 61 L. Ed. 1148 (1917), and Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 38 S. Ct. 553, 62 L. Ed. 1229 (1918), with In re Gibraltar Amusements, Ltd., 291 F.2d 22 (2 Cir.), cert. denied, 368 U.S. 925, 82 S. Ct. 360, 7 L. Ed. 2d 190 (1961), and Empresa Hondurene de Vapores, S. A. v. McLeod, 300 F.2d 222 (2 Cir. 1962)."

In the case of *National Bond Finance Company* v. *General Motors Corporation,* 8 Cir., 341 F.2d 1022, the Court said (l.c. 1023):

"[2, 3] The question of whether a corporation is an instrumentality or an alter ego of another corporation presents primarily an issue of fact to determine upon the basis of the facts of each individual case. The clearly-erroneous rule set forth in Fed. R. Civ. P. 52(a) applies. Consolidated Sun Ray, Inc. v. Oppenstein, supra; Francis O. Day Co. v. Shapiro, 105 U.S. App. D. C. 392, 267 F.2d 669, 674; Fish v. East, 10 Cir., 114 F.2d 177, 191."

The clearly-erroneous rule is applicable here in reviewing the jury verdict below for plaintiff.

In the case of *National Dairy Products Corporation* v. *United States,* 8 Cir., 350 F.2d 321, in a Sherman Act case, the Court said (l.c. 327):

"[4, 5] The evidence clearly indicates that Chapman was not an *independent* subsidiary of National. The relationship between parent and subsidiary was not one of stock ownership alone. Chapman was run

by National in accordance with National's policies and objectives, and with independent existence in form only. In such a situation the courts may disregard the legal fiction of corporate entity. Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501, 38 S. Ct. 553, 62 L. Ed. 1229 (1918). See also Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 61 S. Ct. 675, 85 L. Ed. 982 (1941); United States v. Delaware, Lackawanna & Western R. R. Co., 238 U.S. 516, 35 S. Ct. 873, 59 L. Ed. 1438 (1915). Cf. Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801 (8 Cir. 1964). Since Chapman Dairy was merely an operating division of National Dairy in corporate form, the jury was entitled to find National liable for any conspiratorial conduct in which Chapman might have engaged with its distributor, Martin, prior to the formal merger of Chapman with National on December 31, 1956."

We submit in this case the jury reasonably could have found that Truck Lines was run by Railroad in accordance with Railroad's policies and objectives and that Truck Lines had independent existence in form only; that Truck Lines was merely an operating division of Railroad.

In the case of *N. L. R. B.* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-404, 80 S. Ct. 441, in a labor case, this Court stated the law as follows (l.c. 443):

"But we think the Board is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise.' That is the alternative theory of liability which the Court of Appeals did not consider. We think that the Board is entitled to a hearing on that alternative theory and to discovery in aid of it.

"[2, 3] The question whether the corporations under Weiner's ownership were only departments or divisions in one single enterprise is in a different category than those that arise under either 13 Eliz. or the modern law of preferences. Whether one corporation is liable for the obligations of an affiliate turns on other considerations. The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception. See Pullman's Palace Car Co. v. Missouri Pacific R. Co., 115 U.S. 587, 597, 6 S. Ct. 194, 198, 29 L. Ed. 499. Yet as Mr. Justice Cardozo said in Berkey v. Third Avenue R. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61, 50 A.L.R., 599, 'Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice.' That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) ch. 2, §§ 13, 14; Stevens on Corporations (1949) § 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343."

We submit the jury here reasonably could have found that "the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities."; that Truck Lines was operated as a division of Railroad and the affairs of the two were so intermingled that no distinct corporate lines were maintained.

Railroad as sole stockholder receives no dividends—any profits go into equipment and expansion. (R. 239)

We submit the ruling of the Supreme Court of Missouri in this case is in direct conflict with the controlling decision of this Court in the case of *Shenker* v. *Baltimore and Ohio Railroad Company,* 374 U.S. 1, 10-11, 83 S. Ct. 1667, where in a FELA case, this Court said (l.c. 1673):

> "[11, 12] Although recovery in this case is supported by the common law, it is also required by any reasonable construction of the Federal Employers' Liability Act itself. As we stated in Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 330, 78 S. Ct. 758, 762, 2 L. Ed. 2d 799: 'it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor.' If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk. Cf. Texas & Pac. R. Co. v. Archibald, 170 U.S. 665, 673, 18 S. Ct. 777, 42 L. Ed. 1188.
>
> "[13] In our opinion the case was submitted to the jury under proper instructions, and there was a reasonable basis in the evidence for the verdict which the jury returned."

Here the Truck Lines and Railroad constituted a unitary enterprise and its economic resources should bear the burden of all injuries arising out of the fault of either.

We contend the fiction of a corporate entity for Truck Lines was adopted to avoid the provisions of a statute, to wit, 45 U.S.C.A. 51, *et seq.*

In the recent case of *Kavanaugh* v. *Ford Motor Co.*, 7 Cir., 353 F.2d 710, the Court said (l.c. 717):

> "[4] It is settled doctrine that the fiction of corporate entity will be disregarded whenever it has been adopted or used to evade the provisions of a statute. Schenley Distillers Corp. v. United States, 326 U.S. 432, 437, 66 S. Ct. 247, 90 L. Ed. 181 (1946); United States v. Lehigh Valley R. R. Co., 220 U.S. 257, 272, 31 S. Ct. 387, 55 L. Ed. 458 (1911); Metropolitan Holding Co. v. Snyder, 79 F.2d 263, 266, 103 A.L.R. 912 (8th Cir. 1935). For the reasons we have demonstrated, the Dealers' Day in Court Act would be subverted in the instant case if the corporate format adopted by the parties were given recognition. Hence, we must 'pierce the veil' of the corporate entity and look to the substance and reality of the situation. In the interest of justice, the corporate fiction must be ignored.
>
> "[5] Ford argues that the record affords no proof that the dealership corporation was created for the purpose of evading the statute. The answer is twofold. First, the totality of facts reasonably supports the inference that the corporate format was deliberately adopted in order to defeat the legislative purpose of the act. Second, regardless of intent, the format, if given recognition, effectively insulates Ford from liability under the act. It is inconceivable that Ford, owning all the voting stock of the dealership corporation and being in complete control of it, would ever seek the protection afforded by the statute. Intention is not controlling when the fiction of corporate entity defeats a legislative purpose. 'The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law.' Anderson v. Abbott, 321 U.S. 349, 358, 64 S. Ct. 531, 536, 88 L. Ed. 793 (1944)."

CONCLUSION

The Supreme Court of Missouri, *in Banc*, in reversing the unanimous verdict of the jury has invaded the province of the jury and its opinion conclusively shows that it has failed to follow the teachings of this Court. Certiorari should be granted in this instance to "correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. R. Co.* (352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 493).

Respectfully submitted,

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EXHIBIT A

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

JANUARY SESSION, 1965

EVERETT L. TURPIN,
Plaintiff-Appellant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Defendant-Respondent.

No. 51,026

Appeal from the Circuit Court of Jackson County
Honorable Paul A. Buzard, Judge

(Filed in the Supreme Court of Missouri, April 12, 1965)

Everett Turpin brought suit under the Federal Employers' Liability Act (45 U.S.C.A., Section 51, et seq.) against the Chicago, Burlington & Quincy Railroad Company for damages for injury which he alleged that he sustained as an employee of the railroad. (We will refer to the parties as they appeared in the trial court.) The railroad by its answer denied that Turpin was employed by it at the time of the injury, alleging that at such time he was an employee of the Burlington Truck Lines, Inc. The issues of defendant's negligence, plaintiff's status as an employee of defendant, and damages were submitted to a jury which returned a verdict for plaintiff for $30,000.00. After the verdict, the trial court sustained defendant's motion for judgment on the ground that plaintiff's evidence was insufficient to establish that he was

employed by the defendant within the meaning of the Federal Employers' Liability Act. The trial court also ordered that, in the event that its determination of that issue be found erroneous, a new trial be granted for error in two instructions offered by the plaintiff and given by the court. Plaintiff appealed from the judgment and order. We have jurisdiction by reason of the amount in controversy.

The defendant railroad company is engaged in the operation of a railroad in interstate commerce. It has terminal facilities in Kansas City, Missouri. The railroad operation includes "piggy-back" transportation of motor vehicle trailers on railroad flatcars. Burlington Truck Lines, Inc., a wholly owned subsidiary of the railroad, is a common carrier of property by motor vehicle. The railroad owned some motor vehicle trailers which were transported in its piggy-back operation. Burlington Truck Lines also owned trailers so transported. The railroad owned no motor vehicle tractors. In Kansas City, as elsewhere where the Burlington Truck Lines operated, an arrangement, not the subject of a formal contract, existed whereby Burlington Truck Lines' tractors were used for loading trailers on flatcars and unloading them upon arrival at their destination. The loading operation involved driving a tractor and trailer on a flatcar, separation of the tractor from the trailer, and the anchoring of the trailer to the flatcar by means of a stanchion placed under the front of the trailer and chains placed through the rear wheels of the trailer. Unloading involved removal of the tie-down chains, loosening of connections with the stanchion, driving a tractor onto the flatcar and attaching the trailer to the tractor which then drove from the car. The loading and unloading apparently required at least a two-man crew. Insofar as appears, these crew members were nominally truck line employees.

At defendant's yards in Kansas City, Missouri, loading and unloading of trailers on flatcars was done on cars located on two parallel tracks of the defendant. Between the tracks a wooden ramp of considerable length had been constructed by the defendant for the primary purpose of facilitating unloading of trailers. This ramp was used by persons engaged in securing the trailers on the cars and in the unloading process.

Plaintiff started to work for Burlington Truck Lines as a truck driver in 1957. At the time of his injury he had worked on the piggy-back operation for some three years. The injury which brought about this lawsuit occurred on March 11, 1961, when plaintiff was assisting a truck lines' employee in unloading a trailer. He was attempting to withdraw the chain which anchored the rear wheels of the trailer. The chain suddenly gave way and plaintiff fell to the ground from the edge of the flatcar, a distance of some six feet He struck the edge of the ramp in the course of his fall, causing injuries to his back Plaintiff contended that the ramp was improperly constructed and that the defendant had thereby failed to provide a safe place for his work

On this appeal the first question to be determined is the correctness of the trial court's ruling that the evidence failed to show that the plaintiff was an employee of the defendant railroad company The Federal Employers' Liability Act governs the liability of railroads for injuries to their employees while engaged in interstate commerce. If the plaintiff was not an employee of the defendant within the meaning of that act, he has no cause of action thereunder. Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84; Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449; Ward v. Atlantic Coast Line R. Co., 265 F.2d 75 (reversed on other grounds, 362 U.S. 396). In passing upon the status

of the plaintiff as an employee of the defendant, we are governed by the decisions of the United States Supreme Court concerning the meaning and effect of the federal statute involved. Heppner v. A. T. & S. F. Ry. Co., Mo. Sup., 297 S.W.2d 497, 501(1, 2); Allen v. St. Louis S. F. R. Co., Mo. Sup., 297 S.W.2d 483, 488(5-7); Adams v. A. T. & S. F. Ry. Co., Mo. Sup., 280 S.W.2d 84, 91(1-5). In the recent case of Baker et al. v. Texas & Pacific Ry. Co., 359 U.S. 227, 79 S. Ct. 664, 3 L. Ed. 2d 756, the United States Supreme Court stated the rule for determining the existence of an employer-employee relationship under the Federal Employers' Liability Act as follows:

"The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, 35 S. Ct. 491, 494, 59 L. Ed. 849, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act. See Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28, 33-34, 48 S. Ct. 241, 243, 72 L. Ed. 453. It has been well said of the question that '(e)ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative.' Cimorelli v. New York Central R. Co., 6 Cir., 148 F.2d 575, 577. Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d, sec. 220, comment c; sec. 227, comment a. Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. See Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735." 79 S. Ct. 665.

Recent decisions of the United States Supreme Court in cases involving sufficiency of the evidence on the question of fault or causation under the act (Rogers v. Missouri Pacific R. Co., 352 U.S. 500; Gallick v. Baltimore and Ohio R. Co., 372 U.S. 108; Davis v. Baltimore and Ohio R. Co., 85 S. Ct. 636) point out that courts are required to submit factual matters involving such issue to the jury for its determination "in all but the infrequent cases where fair-minded jurors cannot honestly differ (as to) whether fault of the employer played any part in the employee's injury." Rogers v. Missouri Pacific R. Co., 352 U.S. 510.

Unfortunately, the rule laid down by the United States Supreme Court in Baker does not admit of simple application in a case such as this. The judicial attitude of pre-Baker decisions, such as Cimorelli v. New York Central R. Co., (6th Cir.) 148 F.2d 575, 577, has been echoed in post-Baker cases such as Mazzucola v. Pennsylvania R. Co., 281 F.2d 267, where the court stated:

"This entire question of when an injured workman comes under the (Federal Employers' Liability) Act and when he may look only to what is claimed to be an independent contractor who has hired him is one of continuing difficulty. Fact distinctions are close. As the Sixth Circuit has pointed out in a series of cases, each case has to be looked at by itself and the problem of finding on which side of the line any one case falls is one which has bothered judges before the present incumbents sat on the bench and will continue to be troublesome after they have left. See Cimorelli v. New York Central R. Co. * * *" (supra). 281 F.2d 269.

In post-Baker cases, federal courts have determined the question of employer-employee relationship as a matter of law when the facts are so clear that no reasonable men could differ on the results. On such basis, the question

was determined on summary judgment procedure in De Paola v. New York, N. H. & H. R. Co., 198 F. Supp. 12, and Valentine v. South Coast Corp., 218 F. Supp. 148. See also Schiemann v. Grace Line, Inc., 269 F.2d 596, where, applying the rule of Baker, the question of employment under the Jones Act was determined by the court on a motion for directed verdict. On the other hand, the issue was found properly for the jury in Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 80 S. Ct. 789. In Mazzucola v. Pennsylvania R. Co., supra, the court, although describing plaintiff's evidence as weak, held that summary judgment was inappropriate on the question of plaintiff's status as an employee.

The question here presented is whether or not the evidence was such that reasonable men might draw different inferences therefrom, including inferences favorable to the status which plaintiff alleged to have existed between himself and the defendant. In the present posture of the case, we are not concerned primarily with the evidence which might have induced the conclusion that plaintiff's employee status existed solely with respect to the truck line. Clearly there is evidence from which such conclusion could be drawn. (Plaintiff's employment was by the truck line company; all of his compensation was received from Burlington Truck Lines, Inc.; he checked in for work on Burlington Truck Lines' time recorder; his instructions as to what work he was to do came from Burlington Truck Lines' officials; he reported his injury to Burlington Truck Lines' officials, and he received benefits under the workmen's compensation law for such injury on the basis of his employment by Burlington Truck Lines.) Our concern is whether or not such is the only conclusion which could reasonably be drawn, viewing the evidence in the light most favorable to plaintiff.

To prove his allegation that he was an employee of defendant at the time of his injury, plaintiff relied primarily upon testimony showing the actions of defendant's employees relating to the work which plaintiff performed in loading and unloading trailers. "The question of control of the activities of a given person at a given time is not always easy to determine and may involve many facts and inferences. Full dominion or control involving the right to hire and discharge is clearly not essential and the measure of control is a question of fact * * *." De Maree v. Pennsylvania R. Co., 147 F. Supp. 656, 659 (9-10).

Plaintiff established by interrogatories that the arrangements between defendant and Burlington Truck Lines relative to the loading and unloading of the trailers were not the subject of a formal agreement. According to answers of defendant's representative to plaintiff's interrogatories, defendant compensated Burlington Truck Lines for its services in such respect at the rate of $6.00 for each trailer loaded or unloaded. (Apparently this figure was not correct. Defendant's evidence showed that at the time of plaintiff's injury defendant paid Burlington Truck Lines $10.05 for each loaded trailer placed upon or removed from a flatcar. This figure was based upon cost of the operation to Burlington Truck Lines, to which was added 10%.)

Some testimony by and on behalf of plaintiff was of little if any probative value on the issue of the relationship between plaintiff and defendant. For example, in an apparent attempt to show that defendant controlled plaintiff in the performance of his work, testimony was elicited from plaintiff that railroad inspectors regularly inspected the cars on which the trailers were loaded and gave "instructions" which plaintiff followed. This testimony may well have been ambiguous on the issue of control (Okolin-

sky v. Philadelphia, B. & N. E. R. Co., 179 F. Supp. 801, 805) but in any event it was effectively nullified by plaintiff's acknowledgment on cross-examination that the "instructions" related to the use or nonuse of bad order cars.

Plaintiff testified that switching crews of defendant would inspect the loaded flatcars daily, and if the loading did not meet with their approval, "they tell you (w)hat has to be done before they will move them." Plaintiff testified that changes were frequently made at the direction of the switching crews who found that the trailers had not been adequately anchored in place or that some step in the loading process had not been completed. Apparently, changes made were in such matters as tying down the chains more tightly and putting the bridges between the cars in proper position for transit.

To evidence the relationship which plaintiff was endeavoring to establish, the control exercised by the person for whom the work is done must be of the means and manner of performing the work, as well as of the result. Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 36 S. Ct. 403; Williamson v. Southwestern Bell Tel. Co., Mo. Sup., 265 S.W.2d 354; Madsen v. Lawrence, Mo. Sup., 366 S.W.2d 413, 415; 27 Am. Jur., Independent Contractors, Sec. 7, p. 488. Because of the nature of the work here involved, the line between control of methods of work and of results only is not easily drawn. However, plaintiff's evidence regarding the directions received from the switching crews, considered with other evidence, might well have afforded the basis of an inference by the jury favorable to plaintiff's position.

Plaintiff, as did another employee of Burlington Truck Lines, testified that the defendant's repair track foreman often spoke to him about damage to the flatcars in the

unloading process. Apparently, in the early stages of the "piggy-back" operation, difficulty was frequently encountered in loosening the front end of the trailer from the stanchion which was a part of the flatcar. Hammers were employed to loosen a locking device. According to plaintiff, the repair track foreman told him not to use a heavier hammer on the locking bar because it was "putting burrs on the end, consequently we couldn't get them back in there once they got out." This testimony is equivocal, but its tendency is to show that the repair track foreman was trying to prevent damage to the railroad cars rather than to show a reservation of the right to control the manner in which plaintiff performed his job. However, an inference of control of methods might be drawn therefrom by a jury.

Plaintiff and his fellow employees testifying in his behalf testified concerning three specific instances where railroad personnel, either exclusively or with Burlington Truck Lines' personnel, directly supervised the loading or unloading of the flatcars. In the latter part of 1957 or 1958, a shipment of some 45 trailer loads of flour was to be loaded. According to plaintiff, this was considered an unusually large shipment at that time, and the railroad superintendent and the roadmaster supervised the loading and gave instructions which plaintiff followed.

On another occasion, which a witness placed in 1959 or 1960, highway steel matting had been loaded on trailers which were to be placed on flatcars. Apparently the width of the load made particular care in the proper centering of the trailers on the flatcars necessary in order to permit the load to clear bridges enroute to its destination. According to one witness, railroad and truck line officials rendered "moral assistance" in the loading of these trailers. Plaintiff testified that the railroad officials "spotted" the

trailers on the flatcars, i.e., placed the trailers in position on the flatcars, after which plaintiff proceeded to tie them down.

The third specific occasion was after a wreck had occurred on the railroad lines. "(T)hey had shoved all of the cars and the trailers and pieces of trailers into the pig ramp for us to unload." The railroad superintendent and yardmaster, along with the Truck Lines' manager, told them how to unload the damaged trailers. The date of this incident was not precisely fixed, but it occurred in 1959 or 1960.

Plaintiff also offered testimony that Mr. West, the railroad roadmaster, on occasions, directed the use of a Caterpillar tractor belonging to the railroad in the trailer loading operation.

There was also evidence of the use of some tools of the railroad in the loading and unloading. Plaintiff testified that, "so far as my knowledge" was concerned, the large crowbars and spike hammers used in the loading and unloading were railroad tools.

Despite the evidence of employment by Burlington Truck Lines, we find in the evidence factors connecting plaintiff with the railroad to such an extent that the issue of their relationship must, under Baker, be submitted to a jury for its determination. On the evidence presented, we cannot declare that the only reasonable conclusion to be drawn therefrom precludes the existence of an employer-employee relationship between plaintiff and defendant. We think that reasonably one could infer from the evidence that there was a degree of control reserved and exercised by defendant over the piggy-back loading and unloading operation. Although some of plaintiff's evidence might not establish the measure of control necessary to

make plaintiff an employee of defendant, the evidence did show direct supervision and control by railroad personnel on at least two significant occasions, the flour and highway matting loadings. (The wreck situation is of doubtful probative value.) Defendant dismisses them as remote, unusual incidents. However, since the important factor with respect to control is the existence of the right to control, without regard for its exercise (Smith v. Fine, 351 Mo. 1179, 175 S.W.2d 761, 765(6, 7)), a jury might reasonably conclude that these incidents did evidence the reservation of a right to control, although the right was actually exercised only in somewhat unusual circumstances.

There were other factors which the jury might reasonably consider as evidencing the required relationship between plaintiff and defendant, such as the nature of the work involved, the use of defendant's tools and equipment in the operation, the fact that the work was performed on defendant's premises, employing a facility, i.e., the ramp in question, which defendant had constructed particularly for use in the piggy-back operation.

These are all factors tending to show that plaintiff was an employee of the defendant in loading and unloading the piggy-back trailers. See Restatement of Agency 2d Sec. 220, page 485. "The jury was entitled to reconcile the operative facts if it could do so, and attribute such weight as it desired to particular incidents and to find under a proper charge that (plaintiff) was an employee of the Railroad." Byrne v. Pennsylvania R. Co., 262 F.2d 906, 912 (6-7).

We now turn to the question of whether or not the trial court properly ordered a new trial in view of our conclusion regarding its entry of judgment. The trial court's order specified that a new trial should be granted

because of error in Instructions 2 and 3 offered by the plaintiff and given by the court. Instruction 2 was the plaintiff's verdict-directing instruction on the issue of liability. Plaintiff submitted by Instruction 3 the issue of the existence of the employer-employee relationship between plaintiff and defendant. This instruction told the jury that one of the issues in the case to be decided was whether or not plaintiff was employed by defendant at the time he was injured. The jury was told that the issue was to be determined from all of the circumstances of the case, but that the primary factor to be considered was whether or not the railroad had power to direct, control and supervise plaintiff in the performance of his work at the time he was injured. The jury was also instructed to consider other factors such as who had employed the plaintiff, who furnished the facilities, who paid the plaintiff and who had the power to fire him. The jury was told that, if the railroad through any of its employees had the power to control the plaintiff in the performance of the work he was doing at the time he was injured, even though such power was not exercised, then the jury should find the plaintiff was employed by the railroad at that time. The instruction concluded with the following paragraph:

"The fact that the money used to pay the plaintiff Turpin for the work he was doing at the time he was injured came originally from the Burlington Truck Lines with whom the railroad had made an arrangement, does not remove the defendant railroad from its employer-employee relationship with the plaintiff Turpin and does not relieve the defendant railroad of liability for injuries suffered by the plaintiff' during the course of his railroad employment' as a result of the defendant railroad's negligence." The defendant asserts that this portion of the instruction is erroneous because it assumed the exercise of an employer-employee relationship between the plain-

tiff and the railroad. The plaintiff contends that the instruction, including this portion, is proper because it is practically identical to one which the United States Supreme Court, in the case of Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, held should have been given in a case involving employer-employee relationship. However, in following the Ward instruction too closely, plaintiff fell into error because of the difference in the factual situations in the two cases. Ward was somewhat the converse of this case. Ward was a section hand employed by the railroad. On his day off he was a member of a crew which had been assembled by the railroad's section foreman to repair a privately owned switch track adjacent to the railroad's line. Ward was injured while working on the switch track. The owner of the switch track provided the money which the members of the crew were paid for the work on the switch track. Ward was admittedly an employee of a railroad and the question to be determined was whether or not such relationship existed for the switch track repair. The instruction in referring to his source of compensation properly assumed the fact of his railroad employment. In the present case the issue to be determined was whether or not the plaintiff was, for the purposes of this lawsuit, an employee of the railroad. In this portion of the instruction the existence of such employer-employee relationship is assumed. The portion of the instruction in question does not require that the existence of the employer-employee relationship be found before the matter of source of compensation is taken into consideration. Rather the instruction specifically refers to injuries suffered by the plaintiff "during the course of his railroad employment." In so assuming the actual matter at issue, this instruction was erroneous. Watt v. St. Louis Public Service Co., Mo. Sup., 354 S.W.2d 889, 892(4, 5). The order of the trial court for a new trial based on such error, therefore,

must be affirmed. Inasmuch as a retail of this case will be under the procedure for pattern instructions and instructions upon such new trial should be either those which have been approved for a case such as this or should be drafted in accordance with Supreme Court Rule 70.01, we need not consider other objections to Instruction 3 nor the objections to Instruction 2.

Therefore, the judgment of the trial court entered upon defendant's motion should be reversed and the order granting a new trial affirmed and the cause remanded.

Robert R. Welborn
Commissioner

Houser, C., Concurs

Higgins, C., Concurs

PER CURIAM: The foregoing opinion by Welborn, C., is adopted as the opinion of the Court.

All of the Judges Concur

EXHIBIT B

Judgment of the Supreme Court of Missouri, in Banc

And thereafter, on the 10th day of January, 1966, the following proceedings were had and entered of record in the said cause, to-wit:

Everett L. Turpin, Appellant,

51026 vs. Appeal from the Circuit Court of Jackson County

Chicago, Burlington & Quincy Railroad Company, Respondent.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now

sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant costs and charges herein expended and have therefor execution. (Opinion filed.)

And thereafter, on the 10th day of January, 1966, the opinion of the Court en Banc was filed, which opinion is in words and figures as follows, to-wit:

EXHIBIT C

IN THE SUPREME COURT OF MISSOURI
IN BANC

SEPTEMBER SESSION, 1965

EVERETT L. TURPIN,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant,
Respondent.
No. 51026

Appeal from the Circuit Court of Jackson County
Honorable Paul A. Buzard, Judge

(Filed in the Supreme Court of Missouri, January 10, 1966)

This is a suit under the Federal Employers' Liability Act for personal injuries, filed by one claiming to be an employee of the Chicago, Burlington & Quincy Railroad Company. The jury found for plaintiff and awarded him $30,000. The trial court entered judgment for defendant pursuant to an after-trial motion on the ground that the evidence was insufficient to establish the fact that

plaintiff was an employee of defendant; in the alternative it granted a new trial for error in giving Instructions 2 and 3 offered by plaintiff. Plaintiff appealed in due course. After the adoption of an opinion in Division One of this Court, the cause was transferred to the Court in Banc on the Court's own motion.

As already indicated, the issue here is whether or not plaintiff was an employee of the defendant at the time of his injury. We shall therefore direct our recital of the facts to that issue. The submissibility of the issue of negligence is not in question now. The plaintiff, approximately 42 years old at the time of his injury on March 11, 1961, had been a truck driver for Burlington Truck Lines, Inc., since August, 1957; as such, he belonged to the Teamsters' Union. Burlington Truck Lines, Inc., was incorporated in June, 1945; it acquired by purchase the assets and routes of a predecessor corporation, Burlington Transportation Company (organized in 1935) in so far as the transportation of freight was concerned, but did not take over its passenger or bus business. We shall often refer to it as "Truck Lines," but in the singular form. It acquired an ICC permit, and has since operated as a common carrier of freight, with approximately 9,000 miles of certificated routes in various midwestern and western states, serving the public generally, as does any other common carrier. At the time of plaintiff's injury it was operating approximately 2,100 pieces of equipment, including tractors, trailers and trucks, and it had approximately 1,500 employees. Its general office is in Galesburg, Illinois; the defendant Railroad owns all of its stock, but the Truck Lines operates as a wholly separate entity, with its own bank accounts, paying all its own taxes and expenses, hiring and firing its own employees, and keeping all its financial affairs separate from those of the defendant.

Some members of its Board of Directors are officers of the Railroad. It rents terminal space at certain points, including Kansas City, in the freight houses or terminals of the Railroad, and it pays the Railroad a flat annual fee for furnishing claim and medical services and, to some extent, legal services. The Truck Lines negotiates its own labor contracts; it maintains approximately seven employees in its Kansas City Terminal office, including a dispatcher, and about 47 truck drivers and dockmen work for it out of that terminal.

We shall generally refer to the defendant as the "Railroad." It is a common carrier by rail operating over many of the midwestern and western states. About 1958 the so-called "piggy-back" hauling of highway trailers, loaded and unloaded, on railway flatcars began to develop as an important element in the railroad business. The Railroad owns a rather large terminal and freight house in Kansas City, and others elsewhere. It owns some highway trailers, but no tractors or motive equipment. By an exchange of letters, recognized by the parties as a contract, it agreed with Burlington Truck Lines that it would pay to the latter a unit cost of $10.05 for the loading or unloading of each loaded trailer, which figure included the Truck Lines' then estimated cost, plus ten percent; this unit payment was later reduced somewhat in varying amounts, but after plaintiff's injury. The Truck Lines was paid at an hourly rate for handling by truck less than carload lots of the railroad freight either to or from the terminal; in other words, the Truck Lines was paid at specific rates for all services it performed for the Railroad. It acquired and maintained special tractors with hydraulic fifth wheels and other special equipment for use in the loading and unloading of trailers on the railroad cars.

At a time several years before plaintiff's injury defendant had constructed ramps on two adjoining tracks in its yards so that flatcars could be backed into position and trailers loaded on the cars by running them up the ramps. The details of these ramps are not well shown in our record. Between these two tracks defendant also constructed a "catwalk," elevated some 39 inches above the ties, 23 inches wide, and leaving a space of approximately 21 inches between the edge of the walk and the edge of the flatcar. (Plaintiff said it was somewhat more.) An exhibit in evidence shows that it was 54 inches from the top of the ties to the floor of a flatcar; some cars of a series on which plaintiff said he was working were approximately 12-14 inches higher. The railroad cars with special equipment for accommodating trailers were sometimes called "piggy-back" cars. When a loaded trailer was placed on a car the tractor was disconnected and, in lieu of the support of the tractor, the front end of the trailer was placed on a "stand" or "standchion" (constructed as a part of the car) which could be lowered and raised, to which it was firmly fixed. The rear wheels of the trailer were then secured by chains which were run through the wheels or over the wheels and locked to the side rail or bottom of the car. The work on the chains was supposedly performed from the "catwalk" so far as possible, but plaintiff testified that it was often necessary for him to squat on the edge of the car in order to fasten or unfasten the chains and that he was doing so when injured. The loading and unloading of the trailers required a two-man crew. When the Railroad had trailers to be unloaded or loaded it notified the Truck Lines by a teletype maintained by the latter.

March 11, 1961, was Saturday; plaintiff and one other man (White) were the only ones on duty at the Truck Terminal, except possibly the dispatcher or foreman; for the first four hours plaintiff worked around the terminal

or made deliveries with a truck. After lunch he and White received a teletype message that there were trailers to be unloaded, and they proceeded to the "piggy-back" ramp, presumably to unload cars on a certain track. White drove the tractor; plaintiff handled the "running down" of the stands and the removal of the chains. While engaged in removing a chain which he said had become lodged between dual wheels, standing or squatting on the side of the car, and reaching in between the wheels or over or through a wheel (it is not entirely clear), he fell backwards, struck the edge of the catwalk and thence fell to the ground. White went on and finished the job with such assistance as plaintiff could give. When they quit plaintiff reported his injury to the Truck Lines official then in the office. Plaintiff's injuries are not in issue here, but we note that he returned to work in May, 1961, thereafter was off for periods of two weeks and one week, and has lost very little time since. He worked on the same job for about a year and a half and then "bid in" the job of driving a truck and handling freight solely for Montgomery Ward. He drew Workmen's Compensation as an employee of Truck Lines for 14-15 weeks after his injury until his counsel asked that the claim be "suspended", thus, he never received a final disability rating. The negligence claimed was that the catwalk, constructed by defendant, was too low and too far from the sides of the cars, requiring plaintiff to stand on the edges of the cars instead of working from the catwalk. Plaintiff had worked at this "piggy-back" job "on and off" for about three years, but not regularly.

Since the question of employment is our sole issue, it will be necessary to relate in some detail the testimony which plaintiff adduced in his attempt to show such control or right of control by the defendant of the "piggy-back" operations as would make him its employee. We shall

first relate the substance of the testimony and rule upon its effect later. In so doing, we combine the substance of the testimony of plaintiff and of certain of his witnesses, Truck Lines employees, as follows. At times railroad car inspectors would come around and examine the cars, loaded or unloaded; while plaintiff said at one point that these men gave "instructions," he explained on cross-examination that what he meant was that the Inspectors told them if a car was "bad ordered" and could not be loaded or moved. Switch crews of the Railroad frequently came around and checked the loaded cars to see if the trailers were securely chained down, if the "stand" under the front end of the trailer was secured and locked, and if all "bridges" between cars had been raised and secured; the bridges were metal plates which were drawn between cars to permit the passage of tractors and trailers. If any of these things needed correction, the switch crews so told the men on the job, and they did not move the cars into a train until the necessary correction was made. On several occasions the repair track foreman (referred to as "rip" track foreman) came around to complain that the Truck Lines men had been using heavy hammers to loosen the pins which locked the "stand" in place and that they were putting "burrs" on the ends which made it difficult to use the pins again. The "stand" was a built-in part of the railroad car, and any damage to a car was normally referred to the repair track. This item only concerned the unloading of trailers. This occurred about 1958, and that particular equipment was later replaced, the ramp was wired and an electric wrench was furnished and used. There was some testimony concerning the use of railroad tools; the Truck Lines had a toolbox near the site of these operations and furnished hammers and crowbars. While the testimony is very vague, it seems that on some occasions plaintiff and his co-worker procured larger "spike

mauls" of the railroad to loosen the pins in the stand; plaintiff said: "We finally had to end up swiping some railroad spike mauls to knock it loose with"; and apparently it was the use of these large hammers that the repair foreman complained of. It appears also that the men at certain times used wrenches from the repair track. All this was eliminated, as we understand, when electricity was installed along the ramp and electric wrenches were furnished as a part of the ramp equipment. This apparently was done long before plaintiff's injury. Upon two or three occasions during one day and evening in 1959 Mr. Clay (working with plaintiff) got his tractor stuck in a mudhole beside one of the newly constructed tracks. The Railroad kept a caterpillar tractor in a yard somewhere in the vicinity; it was used by railroad employees to clean up the yard and parking area. Clay used the tractor to push a trailer load of steel out of the mud; on the first occasion this was done on his own volition but with permission—the second time Mr. West, the roadmaster, told him "to use it"; the third time Mr. West used the tractor himself and "tore the back end out of a trailer." This difficulty was apparently eliminated when the railroad put gravel in the mudhole. Plaintiff testified that he had used the tractor at the direction of Mr. West, but he was not at all specific.

Plaintiff also relies upon the supposed actions and directions of railroad employees upon three specific occasions. In 1957 or 1958, when the "piggy-back" business was in its infancy, the railroad received a shipment of 45 trailer loads of flour, presumably for export. This was quite an occasion,—"a great day's work" (as plaintiff testified), with some railroad "supervisory personnel" present, as well as Mr. Cooper, the Truck Lines Manager. When plaintiff had difficulty in loading a trailer one of the railroad men (according to his testimony) told him, "I said put it up

there,"—which he did and tore up the tractor. Plaintiff testified that he had previously been told who these men were, and that this particular man told him who he was and that "he had the authority to tell me." On certain occasions shipments of wide steel matting for highway reinforcement were received on trailers; the steel extended about two feet beyond each side of the flatbed trailers. There was testimony that a prior similar shipment had struck the side of a bridge in Iowa and wrecked the train. On these occasions representatives of the railroad were present and assisted in "spotting" the trailers in the very center of the cars; they, of course, were familiar with the clearances of bridges and tunnels. Plaintiff's co-worker, Mr. Clay, stated that "we had moral assistance from both rail and truck line officials." On another occasion of an unstated date there had been a wreck near Orrick, Missouri, involving cars carrying loaded trailers. The railroad had brought the cars and trailers, "pieces of trailers" and contents to the ramp in Kansas City for unloading. The railroad roadmaster and superintendent and Mr. Cooper, the Truck Lines Manager, were all present. Mr. Clay testified that the railroad men had a crane there and they told us "which side we were to set up so they could get it off * * *" and remove the pieces of trailers. This was prior to 1961; plaintiff did not participate in that operation. We have tried to be very specific in describing all these occurrences, since certain highly conclusional references are made in the briefs to some of these matters.

It was shown that in August, 1958, defendant had issued a single trip pass to plaintiff furnishing transportation for him and his family on certain trains to Scotts Bluff, Nebraska, and return. This was issued to him as a driver for Burlington Truck Lines, and was procured for plaintiff by the Superintendent of the Truck Lines, as a "gratuity."

All of plaintiff's wages were paid by the Truck Lines on time sheets which he turned in. No railroad employees belong to the Teamsters' Union.

Plaintiff's principal point, with several subheads, is that the trial court erred in entering judgment for defendant, because the evidence was sufficient to require submission of the employment issue. We shall cover the subpoints as we reach them. Counsel say that under the FELA decisions, any evidence "even the slightest," will make a jury issue. They cite Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618; Fitzpatrick v. St. Louis-San Francisco Railroad Co., Mo., 300 S.W.2d 490; Dennis v. The Denver, Rio Grande Western Railroad Co., 371 U.S. 946, 84 S. Ct. 291, 9 L. Ed. 2d 946, and Basham v. Pennsylvania Railroad Co., 372 U.S. 699, 83A S. Ct. 965, 10 L. Ed. 2d 80. Those cases all involved issues of negligence or proximate cause under the FELA, and it was to the proof on those questions that the remarks relied upon by plaintiff were directed. On the other hand, it seems clear that the burden of proving *employment* by the defendant in FELA cases is on the plaintiff, that this question is to be determined under general law (general federal law, if there be any difference), and that the terms "employer" and "employee" are used in the act in their usual and natural sense. Ward v. Atlantic Coast Line Railroad Co., (C.A. 5) 265 F.2d 75; Baker v. Texas & Pacific Railroad, 359 U.S. 227; Jones v. New York Central Railroad, (C.A. 6) 182 F.2d 326; Robinson v. Baltimore & Ohio Railroad Co., 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; Gloster v. Pennsylvania Railroad, (W.D.Pa.) 214 F. Supp. 207; Cimorelli v. New York Central, (C.A. 6) 148 F.2d 575. Here plaintiff concedes that he was in the general employment of Truck

Lines, but he insists that, under the evidence, the railroad was also a joint employer at the time of his injury. This, in turn, depends largely upon the extent of control which the Railroad exercised or reserved over the activities in the "piggy-back" loading and unloading. Chicago, Rock Island & Pacific Railway Co. v. Bond, 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. Certain other elements do enter into the consideration. Mazzucola v. Pennsylvania Railroad Co., (C.A. 3) 281 F.2d 267. Plaintiff relies rather strongly on Baker, supra, as to the sufficiency of the evidence, but Baker does not, either by its own language or by subsequent constructions, hold that *any* evidence which may possibly tend to show employment forecloses a directed verdict or a summary judgment. In that case the work of reinforcing or "grouting" the railroad's roadbed had been let out to a contractor; however, it was shown that supervisory employees of the railroad defendant had continuously and daily selected the precise points at which a mixture of cement and sand should be pumped into the roadbed, and the consistency of the mixture to be used; also, when the workmen should move to another selected spot. This "grouting" work was a regular part of the maintenance of the road, and the railroad furnished the material. It was held in substance, and under that evidence, that the defendant had reserved sufficient control over the details and manner of doing the work to create a jury issue on the question of employment, and that all reasonable minds could not arrive at a contrary conclusion.

It will not be practicable to distinguish all of plaintiff's cited cases individually. They are cited largely to show the measure of control necessary to constitute the defendant an employer. One particularly relied on is Cimorelli v. New York Central Railroad, (C.A. 6) 148 F.2d 575. There the United States had, by contract, obtained

from the railroad the use of a storage yard, and the defendant railroad had contracted with Duffy Construction Company to load and unload the freight there, upon a cost plus basis. An employee of Duffy was injured and sued the railroad under the FELA. If Duffy were a true independent contractor, there would have been no liability on the defendant. It was held, after a lengthy discussion of the various tests, that there was a sufficient degree of control by the defendant to create a jury issue on the matter of employment. It appeared there: that defendant's supervisory personnel selected the times and places for all unloading and loading, determined the number of employees Duffy should have, approved or disapproved all wages and salaries, and decided what tools, materials and supplies should be purchased; that the title to all tools and materials vested in the railroad; that the defendant determined what cost items would be approved, with full accounts to be furnished. The court noted that the defendant had retained substantially full control over the work, which was in fact an integrated part of its yard operations, and that actually the primary contract with the government required the defendant to control and supervise all such activities. It is not surprising that, upon those facts, the case was held to present a jury issue on the employment question, by reason of the control not only reserved but actually exercised over almost all details of the performance. Counsel also cite: Byrne v. Pennsylvania Railroad Co., (C.A. 3) 262 F.2d 906; Baltimore & Ohio Southwestern Railroad Co. v. Burtch, 263 U.S. 540; Pennsylvania Railroad v. Roth, (C.A. 6) 163 F.2d 161. In Byrne, an electrical engineer of Westinghouse was loaned to the railroad for a very considerable period of time, riding its trains, checking up on the equipment and very substantially participating in the operations of the railroad. Roth, supra, was another storage yard case somewhat similar to Cimo-

relli, but on weaker facts and with little meaningful discussion. Burtch is so wholly different as not to merit discussion.

In a subpoint counsel urge that anyone "furthering the operational activities of the railroad" is an employee; they cite thereon, Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799, and Carney v. Pittsburgh & Lake Erie Railroad Co., (C.A. 3) 316 F.2d 277. In Sinkler, a cook on the private car of the defendant's general manager was injured by the negligent switching of the car by the Houston Belt Railroad. He sued his own general employer, the Missouri Pacific. The court held that the Belt Railroad was an agent of the Missouri Pacific for the contracted switching purposes and that its negligence was the negligence of one of the "officers, agents or employees" of defendant, under the terms of the act. That determination was not at all the same as the one we are required to make here; there was no consideration of the question of control or other features necessary to make an individual an employee of someone other than his general employer. The handling of defendant's train in furtherance of its business was merely held to make the Belt Railroad and its employees "agents" (not "employees") of the defendant. Two justices dissented and two concurred on the ground that defendant's duty could not be delegated. Carney, supra, involved an injury to a lineman in the regular employ of defendant, while he was on work away from home and was staying at the railroad YMCA at defendant's direction and expense. A defective bed fell with him during the night. The court held that the YMCA was, at the time, performing "operational activities" for the defendant. Actually, the real holding would seem to be that the injury was one incident to plaintiff's regular employment. The loading of cars is normally not a part of the

operating functions of a railroad. They are delivered empty to the consignor, who does that work himself.

Counsel also argue that the Burlington Truck Lines was set up by defendant as an "illegal device" to avoid liability under the FELA and that such is prohibited and "void." They emphasize the sole ownership of the stock and the presence of railroad officers on the Truck Lines board; so, they say, the Truck Lines is merely an agent of the railroad. They cite: Davis v. Alexander, 269 U.S. 114, 46 S. Ct. 34; Eddings v. Collins Pine Co., 140 F. Supp. 622; Ward v. Atlantic Coast Line Railroad Co., 265 F.2d 75; Del Vecchio v. Pennsylvania Railroad Co., 233 F.2d 5, and Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799. In Davis, one railroad operated another as part of a single system. In Eddings, a railroad carrier sought to delegate all its operating functions to a corporation which was not a common carrier. Ward recognized the existence of an independent contractor relationship, as did Del Vecchio. We fail to understand why counsel has cited some of these cases.

In the absence of fraud, connivance or an undue domination, the law recognizes the separate entities of corporations, even though one owns the stock of the other; and this principle is applicable in solving questions of employment, as here. Nor is the one, for that reason, the alter ego of the other. Garrett v. Southern Railway Co., (D.C. Tenn.) 173 F. Supp. 915; aff. C.A. 6, 278 F.2d 424; Kentucky Electric Power Co. v. Norton Coal Mining Co., (C.A. 6) 93 F.2d 923; Gaulden v. Southern Pac. Ry., (D.C. Cal.) 78 F. Supp. 651; Fawcett v. Missouri Pacific Railroad Co., (D.C. La.) 242 F. Supp. 675, aff. C.A. 5, 347 F.2d 233. In the latter case the court said, in part, at 242 F. Supp., loc. cit. 677-678: "As we analyze it, plaintiff's real contention is that because the trucking com-

pany is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad. The jurisprudence as we read it is to the contrary. (Citing cases.) Plaintiff has alerted us to avoid inter-company arrangements drawn to avoid federal jurisdiction under the FELA. We find nothing here indicative of such a purpose, but we point out as did the Third Circuit (Shaw v. Monessen Southwestern R. R. Co., 200 F.2d 841) that we should also be alert to avoid the extension of a statute applicable to railroad employees in interstate transportation to cover those engaged in other occupations. Such an extension might well deprive a widow and children, as it would here, of their rights under a state compensation act where their right of recovery would not depend upon proof of negligence. * * * A corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all of the stock of one corporation by another and the identity of officers of one with officers of another are not alone sufficient to create identity of corporate interests between the two or the relation of principal and agent between them." We find nothing in the record here to indicate fraud or any collusive device. The Truck Lines was operated as a wholly independent entity, serving the public generally over a far-flung territory, hiring and firing its own employees, paying its own expenses and taxes, carrying its own insurance, owning its own equipment and generally controlling its own independent operations. It performed similar work in loading and unloading trailers at Chicago for various freight forwarders. It was in no way engaged in the railroad business. And, as held in Ward v. Atlantic Coast Line Railroad, supra, the "device" argument cannot in any event be used to *create* employment under the FELA.

In many FELA cases the courts have recognized the existence of an independent contractor relationship, holding that unless the relationship is in some way subverted, the employees of the contractor *remain* his employees and no one else's. Chicago, Rock Island & Pacific Railway Co. v. Bond, 240 U.S. 449; Gaulden v. Southern Pac. Co., (D.C. Cal.) 78 F. Supp. 651; Latsko v. National Carloading Co. (C.A. 6) 192 F.2d 905; Jones v. New York Central Railroad, (C.A. 6) 182 F.2d 326; Wells Fargo & Co. v. Taylor, 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205; Fawcett v. Missouri Pacific Railroad Co., (D.C. La.) 242 F. Supp. 675, aff. C.A. 5, 347 F.2d 233; Gloster v. Pennsylvania Railroad, (W.D. Pa.) 214 F. Supp. 207; De Paola v. New York, New Haven & Hartford Railroad, (D.C. Conn.) 198 F. Supp. 12; Aguirre v. Southern Pac. Railroad, (Ct. App. Cal.) 43 Cal. Reporter 73; Schiemann v. Grace Line, Inc., (C.A. 2) 269 F.2d 596 (Jones Act); Valentine v. South Coast Corp., (D.C. La.) 218 F. Supp. 148. These cases consider, generally, the extent of control necessary to make an employee of the independent contractor an employee of the other contracting party, and further hold that the term "employee" is to be given its usual and natural meaning in FELA litigation. It would be wholly impracticable to discuss the facts of all these individual cases. Generally, the reservation of the right to control the details of the work, as distinguished from its result, is the material factor. Bond, supra. We note in passing: that "occasional directions" given by a railroad crew to the employees of a carloading company working on railroad premises are not controlling (Latsko); that express messengers, working regularly on trains in cars furnished by the railroad, are not its employees (Jones, Wells Fargo) nor is there a joint employment; that an employee of Missouri Pacific Truck Lines, crushed between two highway

trailers being loaded on a flatcar of the Missouri Pacific Railroad, was not an employee of the railroad, when hired and paid by the wholly owned subsidiary, and that he was not doing railroad work (Fawcett); that a general control over all transportation functions does not suffice to make an employee of the Pullman Company an employee (also) of the railroad (Gloster). In De Paola, Fawcett and Aguirre summary judgments were entered; in Schiemann, a verdict was directed; in Gaulden, Bond, Jones and Wells Fargo the issue was decided by the court as a matter of law, either by reversal of a judgment, dismissal of the case, or the entry of a defendant's judgment.

Every case of this character must rest upon its own facts, and we should consider the adjudicated cases as mere guidelines. Before evaluating the evidence, we note again that mere suggestions and cooperation by the railroad do not constitute control, nor do they make an employee of the Truck Lines *its* employee. Latsko v. National Carloading Co., (C.A. 6) 192 F.2d 905; O'Brien v. Rindskoff, Mo., 70 S.W.2d 1085; Standard Oil Co. v. Anderson, 212 U.S. 215; and it is the relationship existing *at the time* of the injury which is material. De Paola v. New York, New Haven & Hartford Railroad Co., (D.C. Conn.) 198 F. Supp. 12; McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W.2d 67, 136 A.L.R. 516. We have seen that, even under the most recent federal decisions, if reasonable minds cannot differ on the effect of the evidence and its inferences, no jury issue exists.

The so-called "instructions" from car inspectors were conceded to be mere determinations of the condition of the car itself, and were immaterial. The inspections by the switch crews were made to make certain that the loads were properly secured and would not shift, and that the cars were ready to move; this, regardless of any

regulations or tariff provisions now referred to, was a function which the railroad would and should normally perform as a safety measure and for its own protection. It was, in actuality, an inspection of the *result* of the work performed. The complaints of the repair track foreman were likewise made in an effort to protect railroad property, and these could not logically constitute the exercise of any control over the details of the work; and, certainly, if railroad "control" was to be exercised, he would not seem to be the appropriate supervisor. The evidence concerning the use of railroad tools was so vague that it hardly constitutes substantial evidence; generally, it seems, these men at certain times appropriated one or more large hammers or mauls for one specific operation and these were the very tools that the foreman complained of. There was some evidence of the use of Railroad wrenches for a time. None of the times is fixed, even approximately. No established practice of the Railroad to furnishing tools was shown, nor would that element, in and of itself, be very persuasive. The whole method was apparently changed before plaintiff's injury, when electric wiring was installed. The permissive use of the railroad tractor on a very few occasions to push trailers out of a mudhole was a mere act of courtesy, a form of co-operation, necessitated by the fact that the railroad had not at that time properly constructed the access route to the ramp. The tractor was not even kept at the "piggy-back" ramp, but was obtained from some other place.

The three instances concerning the loading of the flour, the loading of the highway steel matting and the unloading of the broken-up trailers (following a wreck) were single, isolated occurrences, one in 1957-1958, and all prior to 1961. The precise spotting of the trailers with the wide steel matting was absolutely necessary for the

protection of the railroad and its property and constituted no exercise of control in the ordinary sense. In this, again, it was the *result* that the Railroad was interested in. The unloading of the broken trailers in 1959 or 1960 was not a job within the ordinary contemplation of the Truck Lines' contract; the railroad superintendent and road-master and the Truck Lines Manager were all "helpful" as they should have been. The contract, as we understand, did not contemplate the salvaging of wrecks. The railroad had furnished a crane and necessarily participated in such an unusual job. It was also the railroad's financial responsibility to salvage as much from the wreck as possible, and it recognized this. This evidence is of no real significance. The loading of the 45 trailers of flour apparently turned into a sort of celebration; dignitaries were there, including (according to plaintiff's hearsay testimony) certain railroad officials, and the Truck Lines Manager. The only significant part of this testimony is plaintiff's statement that one railroad man (whom he could not identify) told him, when he had trouble getting a trailer loaded on the car, to "put it up there" which he did, ruining the tractor. This was a strictly isolated incident occurring approximately three years before plaintiff's injury. It represented, probably, a spontaneous outburst by an overly-enthusiastic employee. Standing alone, it does not warrant an inference of control sufficient to make a submissible issue here. The trip pass given to plaintiff and his family in 1958 was not issued to him as a railroad employee, but specifically as a Truck Lines employee; it was a courtesy extended at the request of a Truck Lines officer. Whether its issuance was illegal under federal law (as plaintiff contends) or not, it *was* issued and used, but its issuance has no relevance here on the question of employment.

We have concluded that the defendant contracted with the Truck Lines to load and unload as an independent contractor, that nothing was done to impair that relationship, and that plaintiff remained solely the employee of the Truck Lines. We further find that on this evidence reasonable minds could not differ, and that the trial court properly sustained defendant's motion for judgment and entered judgment for it. In this situation a consideration of the instructions becomes unnecessary.

Plaintiff's motion to strike respondent's supplemental brief, which was ordered taken with the case, is overruled. The judgment of the trial court is affirmed.

All concur.

Henry I. Eager, Judge.

EXHIBIT D

Judgment of the State Court

(Filed August 14, 1964)

ORDER

Defendant's Motion for Judgment is sustained for the reason that plaintiff's evidence was insufficient to establish that plaintiff was employed by or was in the employ of the defendant or was an employee of the defendant within the meaning of the Federal Employer's Liability Act.

The judgment is therefore set aside and judgment is entered for the defendant.

On Defendant's Motion for a New Trial, this Court holds that Instructions numbered 2 and 3 offered by the plaintiff and given by this Court are erroneous, and if this Court committed error in entering judgment for the

defendant, that a new trial should be granted to the defendant on the grounds as above set forth.

/s/ Paul A. Buzard
Judge

EXHIBIT E

IN THE SUPREME COURT OF MISSOURI
IN BANC

SEPTEMBER SESSION, 1965

EVERETT L. TURPIN,
Appellant,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Respondent.
No. 51026

Application for Stay of Enforcement of the Judgment and All Further Proceedings Herein to Permit Application to the Supreme Court of United States for Certiorari or by Appeal

To: Honorable Clem F. Storckman, Chief Justice, Supreme Court of Missouri:

Comes now the appellant, Everett L. Turpin, by counsel and respectfully presents this, his application for an order withholding the mandate and staying of execution and enforcement of the judgment against him rendered in the above case on January 10, 1966, and staying of all further proceedings herein for a period of ninety (90) days from February 14, 1966, the date the motion for a rehearing was overruled under the provisions of Section 2101 (F), Title 28, of the United States Code, to enable this appellant as petitioner herein to apply for and obtain a writ

of certiorari from the Supreme Court of the United States or to perfect an appeal to that Court, and in support hereof petitioner incorporates the certificate of his counsel, Walter A. Raymond, of Kansas City, Missouri.

/s/ Walter A. Raymond
915 Grand Avenue
Kansas City, Missouri
HA 1-0556

and

Dwight Roberts
800 Temple Building
Kansas City, Missouri

Attorneys for Everett L. Turpin, Appellant-Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that it is the bona fide intention of petitioner to make application to the Supreme Court of the United States for a writ of certiorari or to perfect an appeal to that Court from the judgment herein within the ninety (90) days requested, and I believe there is merit in this case and that the judgment of the Supreme Court of Missouri ought to be reversed by the Supreme Court of the United States.

/s/ Walter A. Raymond
915 Grand Avenue
Kansas City, Missouri
HA 1-0556

Of Counsel for Petitioner

NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: Mr. Clyde J. Linde, Attorney for Respondent, Chicago, Burlington & Quincy Railroad Company, a corporation:

You are hereby notified that Everett L. Turpin, appellant and petitioner, will file with the Clerk of the Supreme Court of Missouri for submission to the Honorable Clem F. Storckman, Chief Justice of the Missouri Supreme Court, on Monday, February 28, 1966, his application for stay of the mandate and for stay of enforcement of the judgment and all further proceedings herein as above set out to permit an appeal or application for certiorari to the Supreme Court of the United States.

I hereby certify that I served the above and foregoing application and notice on the respondent, Chicago, Burlington & Quincy Railroad Company, a corporation, by mailing one copy to Mr. Clyde J. Linde, 300 Union National Bank Building, Kansas City, Missouri, its attorney of record herein, this 25th day of February, 1966.

/s/ Walter A. Raymond

Of Counsel for Appellant-Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1307

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. .....

EVERETT L. TURPIN,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The case was commenced and tried in the Circuit Court of Jackson County, Missouri, at Kansas City. No opinion was written by the trial court. A copy of its judgment appears in Petitioner's Brief as Exhibit D at page A33. There is only one opinion of the Supreme Court of Missouri which is its *en Banc* opinion appearing as Exhibit C

beginning at page A15 of Petitioner's Brief. The opinion of Division One of the Supreme Court of Missouri printed in Petitioner's Brief as Exhibit A commencing at page A1 was not adopted by the Court *en Banc* and is a nullity.

QUESTION PRESENTED

Respondent submits that the sole question presented is whether the Supreme Court of Missouri *en Banc* erred in following the decisions of this Court in *Baker* v. *Texas & Pacific R. R.*, 359 U.S. 227 (1959) and *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U.S. 84 (1915) and in holding that the question of whether Petitioner was an employee of Respondent within the meaning of the Federal Employers' Liability Act (45 U.S.C., Sec. 51) is to be determined by general law principles, and in further holding that the terms "employee" and "employer" are not used in said Act in any special sense.

Respondent further submits that in effect by Petitioner's plea to this Court, he asks this Court to overrule well founded opinions that the extension of coverage of the Federal Employers' Liability Act to include persons other than railroad employees in the traditional sense is a legislative and not a judicial function.

STATEMENT OF THE CASE

Petitioner Everett L. Turpin, a truck driver for Burlington Truck Lines, a corporation, brought suit against Chicago, Burlington & Quincy Railroad Company claiming that at the time of his injury he was an employee of the railroad and was entitled to sue under the Federal Employers' Liability Act.

Petitioner was injured on March 11, 1961, while unloading a "Piggy Back" trailer from a railroad flat car of Chicago, Burlington & Quincy Railroad Company at its

"Piggy Back" unloading yard in North Kansas City, Missouri. At the time of the injury and for four years prior thereto Petitioner was employed as a truck driver for Burlington Truck Lines, a corporation, and he belonged to the Teamsters' Union (A. F. of L.) which was the union at Burlington Truck Lines (T. 126). In this employment he was under social security (T. 219) and state workmen's compensation (T. 124, 125). Petitioner's time records each day were turned over to his dispatcher for Burlington Truck Lines and Petitioner was paid his wages by Burlington Truck Lines (T. 133). After Petitioner was hurt he reported to Burlington Truck Lines (T. 123). He filed a claim against Burlington Truck Lines for workmen's compensation benefits for the injury of March 11, 1961 and was paid workmen's compensation by the Truck Lines (T. 124, 125).

The business of Burlington Truck Lines was the transportation of commodities in general, operating under Interstate Commerce Commission Permit No. 107500 as a common carrier serving the public (T. 217). It operated in excess of 9000 miles of routes; employed approximately 2100 pieces of vehicular equipment, such as tractors, trailers and trucks, and owned its own general office building in Galesburg, Illinois (T. 217). In 1961 it employed approximately 1500 employees, plus 108 supervisory people directing the work of others. Its policies were determined by its own Board of Directors. It paid its own taxes of every kind, hired and fired its employees and maintained its own records, bank accounts and transacted all its business affairs. Its capital stock was wholly owned by the Chicago, Burlington & Quincy Railroad Company.

The Chicago, Burlington & Quincy Railroad Company is a railroad corporation licensed by the Interstate Commerce Commission as a carrier by rail. It has no facilities on any part of its system for unloading trailers shipped on railroad

flat cars "Piggy Back," and wherever the railroad avails the public of the service of shipping trailers on flat cars it has contracts with others, including Burlington Truck Lines on the Burlington Truck Lines system, for loading and unloading of trailers on and off of its flat cars (T. 258). In 1961 the railroad had a contract with Burlington Truck Lines covering the loading and unloading of piggy-back trailers on and off of flat cars at the unit price of $10.05 per loaded trailer paid by the railroad to the Truck Lines (T. 244). The trial court and the Supreme Court of Missouri *en Banc* concluded that the Chicago, Burlington & Quincy Railroad Company contracted with the Truck Lines to load and unload trailers on and off of its flat cars as an independent contractor, that nothing was done to impair that relationship, and that Petitioner remained solely the employee of the Truck Lines. At the time Petitioner was injured no railroad employee was present (T. 117, 118, 119). Information concerning the piggy-back cars to be unloaded that day was obtained by Petitioner or his helper from the Truck Lines teletype (T. 116). The labor agreements of the railroad are all with the various seventeen railroad brotherhoods and none are with Petitioner's union (T. 265). The railroad employees are under the Railroad Retirement Act for retirement, sickness and accident benefits (T. 265) and are not under state workmen's compensation and social security as was Petitioner (T. 124, 125, 219).

ARGUMENT

I

The Terms "Employee" and "Employer" Are Used in Their Usual and Natural Sense in the Federal Employers' Liability Act

The Supreme Court of Missouri *en Banc* correctly stated and followed the law of this Court and the general

law in holding that the burden of proving employment of Petitioner by the railroad is on the Petitioner in a case under the Federal Employers' Liability Act and that the terms "employee" and "employer" are used in the Act in their usual and natural sense. As it is said in *Baker* v. *Texas and Pacific Ry. Co.*, 359 U.S. 227, 228 (1959):

> "The Federal Employers' Liability Act does not use the term 'employee' and 'employer' in any special sense, *Robinson* v. *Baltimore & Ohio Railroad Company*, 237 U.S. 84, 94, 35 S. Ct. 491, 59 L. Ed. 849, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act. See *Linstead* v. *Chesapeake & Ohio Railroad Company*, 276 U.S. 28, 33, 34, 48 S. Ct. 241, 243, 72 L. Ed. 453. It has been well said of the question that each case must be decided on its own peculiar facts and ordinarily no one feature of the relationship is determinative."

The Fifth Circuit considered an almost identical case wherein the sole issue was whether a deceased truck driver was an employee of the railroad in an action under the Federal Employers' Liability Act. The District Court had held that there was no genuine issue of fact, and that no reasonable man could differ with the conclusion that the deceased was not an employee of the railroad at the time of his death. The Fifth Circuit in a *per curiam* opinion said in *Denia M. Fawcett, Admx.* v. *Missouri Pacific R. R. Co.*, 347 F. 2d 233 (5th Cir., 1965), *certiorari* denied 382 U.S. 907 (1965):

> "The various relevant factors under the law in determining whether the injured or killed person was an employee of the railroad carrier with respect to the Federal Employers' Liability Act have been ruled on several times by Supreme Court," (citing *Baker* v.

Texas and Pacific Ry. Co., supra, Ward v. *Atlantic Coast Line R. R. Co.*, 362 U.S. 396, 400 (1960), and *Sinkler* v. *Mo. Pac. R. R. Co.*, 356 U.S. 326 (1958), rehearing denied 356 U.S. 978 (1958)).

Although the *Ward* and *Sinkler* cases are concerned with an "agent" under the Federal Employers' Liability Act as opposed to an "employee," these cases as well as *Baker, Robinson* and *Linstead,* supra, establish that this Court has often stated definite criteria for determining who is an employee and who is an agent under the Act; that the test is rooted in well established general federal law principles; and that Congress did not change these criteria in passing the Federal Employers' Liability Act. There are numerous other federal opinions to support this law including *Jones* v. *New York Central R. R.*, 182 F. 2d 326 (6th Cir., 1950); *Gloster* v. *Pennsylvania R. R.*, 214 F. Supp. 207 (W.D. Pa., 1963).

Since this Court has established certain criteria for determining who is an employee within the Act and since the Supreme Court of Missouri has demonstrated in its opinion that it recognized, followed and decided this case in accordance with these criteria, and since Petitioner fails to establish otherwise, it would appear that no question is presented under Rule 19 of this Court for review on *certiorari* and that the petition should therefore be denied. Apparently Petitioner's chief complaint is that the trial court and the Missouri Supreme Court *en Banc* did not decide the case in accordance with his interpretation of the evidence. No "special and important reasons" are presented which require this Court to take jurisdiction. It appears that the questions which Petitioner has undertaken to present consist of nothing more or less than "an invitation" to this Court to "try the case de novo."

The following language used by this Court in the case of *Timkin Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97 (1951), seems to be pertinent:

> "For the most part this shotgun approach is actually only a dispute as to the proper inference to be drawn from the evidence in the record; in effect, it is an invitation to us to try the case de novo. This Court must decline such an invitation just as it does when the Government makes the same request. United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150."

Respondent submits that the questions sought to be presented by Petitioner are not of such character as to require the consideration of this Court under its rules.

Petitioner's attempt to establish that Jones Act cases must be submitted to the jury even though the Court finds insufficient evidence of the relationship of an employee and employer is not sound. In a recent opinion of the Second Circuit in *Schiemann* v. *Grace Line*, 269 F. 2d 596 (2nd Cir., 1959), it was stated that a case under the Jones Act is not for the jury where reasonable men could not differ. In all of the Jones Act cases cited under Petitioner's point 1, qualifying words are found such as "if a finding on this question has evidence to support it" or "if it has a reasonable basis." The necessity of having "evidence to support" a finding or a "reasonable basis" for such finding is a part of the well established general law. It was the law applied in this case by the Missouri Supreme Court *en Banc* whose opinion reads in part:

> "We have concluded that defendant contracted with Truck Lines to load and unload as an independent contractor, and nothing was done to impair that relationship, and that plaintiff remained solely the employee of the Truck Lines. We further find that on this issue reasonable minds could not differ, and

that the trial court properly sustained defendant's motion for judgment and entered judgment for it." (Petitioner's Brief A33).

Petitioner relies on *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500 (1957), as demonstrative of Petitioner's argument that the words "employer" and "employee" are not to be given their natural and ordinary meaning in Federal Employers' Liability Act cases and Petitioner therefore argues that courts are bound to apply a different standard in Federal Employers' Liability Act cases in determining who is an employee. The *Rogers* case does not support this argument. It involved the issue of negligence or proximate cause under the Federal Employers' Liability Act as was pointed out by this Court under Paragraphs [9-10] of its opinion where it is stated:

> "The Congress when adopting the law was particularly concerned that the issue whether there was fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the Courts developed concepts of assumption of the risk and of the coverage of the law which defeated employee claims as a matter of law. Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact finding function of the jury the decision of the primary question raised in these cases—whether employer's fault played any part in the employee's mishap."

The *Rogers* case as it relates to an employer's fault or negligence does not modify the rule of applying general federal law in determining who is an employee within the

Act. As so aptly put by the Sixth Circuit in *Jones* v. *New York Central R. R.*, 182 F. 2d 326, 328 (6th Cir., 1950), a case in which it was held that an express messenger while on duty in an express railway car forming a railroad train was not an employee of the railroad:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company would be liable under the Act."

Also, *Gaulden* v. *Southern Pacific Co.*, 78 F. Supp. 651, 656 (N.D. Cal., 1948), emphasizes the fact that the Federal Employers' Liability Act has not changed the commonly known concept of the employee-employer relationship when it states:

> "The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the Courts to extend coverage of the Liability Act into new fields. During the 40 years of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the Statute beyond railroading in its true sense."

Petitioner relies on the following cases wherein the injured party was in the general employ of the defendant railroad. Not one of these cases involves an employee of

an independent contractor of the railroad. These cases include *Gallick* v. *The Baltimore and Ohio R. R. Co.*, 372 U.S. 108 (1963); *Shenker* v. *Baltimore & Ohio R. R. Co.*, 374 U.S. 1 (1963); *Sinkler* v. *Missouri Pacific R. R. Co.*, 356 U.S. 326 (1958), rehearing denied 356 U.S. 978 (1958); *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 50 (1957); and *Reed* v. *Pennsylvania R. R.*, 351 U.S. 502 (1956).

Another group of Federal Employers' Liability Act cases cited by Petitioner includes *Baker* v. *Texas and Pacific Ry. Co.*, 359 U.S. 227 (1959), *Byrne* v. *Pennsylvania R. R.*, 262 F. 2d 906 (3rd Cir., 1958), as amended on denial of rehearing (1959), and *Cimorelli* v. *New York Central R. R.*, 148 F. 2d 575 (6th Cir., 1945). In each of these cases the courts found that the evidence contained factual elements of control over the plaintiff by the railroad under the master and servant rule sufficient to make a case for the jury on the question of employment by the railroad. In our case both the trial court and the Missouri Supreme Court *en Banc* found that reasonable minds could not differ on the ultimate fact that Petitioner was not an employee of the railroad.

There are a number of District Court and Circuit Court citations on pages 15, 17, 18 and 19 of Petitioner's Brief which are cited apparently to show that the principles of the *Rogers* case, which principles relate to fault and negligence, also should apply to the determination of who is an employee and who is an employer. But as we read the cases they do not support Petitioner's contention. In *Dixon* v. *Serodeno*, 331 F. 2d 668 (6th Cir., 1964), it was held that in Jones Act cases substantive federal law controls and the Court discussed the rule that a presumption that defendant used ordinary care does not forbid jury from finding against the presumption. *Nelson* v. *Green Line Steamers*, 255 F. 2d 31, 34 (6th Cir., 1958), involved a question of procedure.

The rule involved was that the personal representative of a seaman is entitled under the Jones Act to trial by jury, however the parties in the case waived a jury and the court tried the case without a jury and the question was raised whether appellant received a hearing upon the merits to which he was entitled. In *Adams* v. *Kelly Drilling*, 273 F. 2d 887 (5th Cir., 1960), the Circuit Court affirmed the action of the trial court in holding that there was sufficient evidence of negligence to support a jury verdict for defendant and the Circuit Court refused to grant new trial on claimed errors in instructions. Similarly inapplicable is *Offshore Company* v. *Robinson*, 266 F. 2d 769 (5th Cir., 1959). While this case includes the generally accepted language that a jury is allowed to decide who are seamen under the Jones Act, it also states (under paragraph [4]) that the traditional function of court and jury still obtains and that a trial or appellate court may in the proper case hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman of a crew of a vessel under the Jones Act. *Keynon* v. *Tennessee Towing Co.*, 296 F. 2d 785 (6th Cir., 1961), was an action involving injuries sustained by the plaintiff in cleaning a vessel. A judgment was for the plaintiff on the issue of negligence and unseaworthiness. The Circuit Court affirmed this result as there was substantial evidence to support the findings of the jury that the plaintiff was at the time of his injury a seaman within the meaning of the Jones Act. A similar result was reached in *Mach* v. *Pennsylvania R. R. Co.*, 317 F. 2d 761 (3rd Cir., 1963), which was an action under Jones Act in which judgment in the trial court was for plaintiff. The Court of Appeals held that the evidence was sufficient to raise a jury question as to whether the bargeman was a seaman and as to whether defendant's negligence was cause of injury. The case of *Bernardo* v. *Bethlehem Steel Co.*,

314 F. 2d 604 (2d Cir., 1963), merely states the well-known rule that findings, whether by judge or jury, must be sustained on appeal unless "clearly erroneous" or if there is no "reasonable basis" to support them. The case of *Ratigan* v. *New York Central R. R.*, 291 F. 2d 548 (2d Cir., 1961), likewise does not support Petitioner's contentions. The case involved an action by a brakeman against his railroad employer. No question of employment arose, but rather only the question of negligence. The Court held that on the question of negligence the employee is given the benefit of every doubt. In the case of *Kodack* v. *The Long Island R. R. Co.*, 342 F. 2d 244 (2d Cir., 1965), the plaintiff sued his railroad employer and the only question was with regard to the negligence of railroad.

II

Opinion of Division One of Missouri Supreme Court a Nullity

The factual and legal conclusions of Commissioner Welborn of Division 1 of the Missouri Supreme Court, as set out beginning at page A1 of the Appendix to Petitioner's Brief, were based upon a misunderstanding and a misinterpretation of the evidence and said conclusions were not adopted by the Supreme Court of Missouri *en Banc*. The opinion was set aside by the Court *en Banc* and the case was transferred to the Court *en Banc* (R. 366). There is only one opinion of the Court and that was adopted *en Banc* and filed on January 10, 1966. The opinion appears in the Petition for Writ of Certiorari filed herein at page A15 as Exhibit C. When a rehearing is granted or a case is transferred from a division of the Supreme Court of Missouri to the Court *en Banc*, as was done here, the case stands as if it had not been previously

heard and submitted. When the original divisional opinion of the Supreme Court is rejected on rehearing it becomes a nullity as though it had never been written. *In re Thomasson's Estate,* 192 S.W. 2d 867 (S. Ct. Mo., 1946). This is also stated in the matter of *In re McMenamy's Guardianship,* 270 S.W. 663 (S. Ct. Mo. *en Banc,* 1925), wherein the Supreme Court of Missouri *en Banc* on Motion for Rehearing refused to consider a divisional opinion which was not adopted *en Banc* and stated, at l.c. 667:

> "Although printed in appellant's briefs here, it is not an opinion for our consideration. * * * It was no opinion and as such required no mention."

Again the Supreme Court of Missouri *en Banc,* in *Morgan* v. *Kroger Grocery & Baking Co.,* 154 S.W. 2d 44 (S. Ct. Mo. *en Banc,* 1941), said that a case transferred to the Court *en Banc* after a divisional opinion stands as if it had not been previously heard and submitted.

III

Opinion of Missouri Supreme Court Is Not in Conflict with Opinions of This Court

Petitioner says the opinion of the Missouri Supreme Court is in conflict with *Baker* v. *Texas and Pacific Ry. Co., supra, Sinkler* v. *Missouri Pacific R. R. Co., supra,* and *Ward* v. *Atlantic Coast Line Ry. Co., supra,* but we do not agree. We have commented above on *Baker.* Sinkler was an employee of the Missouri Pacific Railroad Company whom he sued. He was injured by the fault of an employee of the crew of the Houston Belt and Terminal Railway which was switching the car in which plaintiff was working for his employer, the Missouri Pacific. The question was whether the Belt in doing the switching was an agent for the Missouri Pacific so as to make the Missouri Pacific liable to plaintiff and thus the case is not

pertinent to our case. Likewise in the *Ward* case the plaintiff was employed by the defendant railroad and he was working on a Saturday (not a railroad work day) on a privately owned siding and for the owner of the siding which was not the railroad. This Court held that the company which owned the siding and which had engaged the railroad's foreman and his crew which included the plaintiff to make a repair on the siding on their day off was not the agent of the railroad within the meaning of the Federal Employers' Liability Act although using the work tools supplied by the railroad and following the standard railroad methods for doing the work.

IV

Employees of Burlington Truck Lines Remained Its Employees

There are many Federal Employers' Liability Act cases in which this Court and other courts have recognized the independent contractor relationship and they hold that the term "employee" is to be given its usual and natural meaning under Federal Employers' Liability Act litigation. The opinion of the Supreme Court of Missouri shows the Court considered and followed these cases which include: *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920); *Chicago, Rock Island & Pacific Ry. Co.* v. *Bond*, 240 U.S. 449 (1916); *Fawcett* v. *Missouri Pacific R. R. Co.*, 242 F. Supp. 675 (W.D. La., 1965), aff'd 347 F. 2d 233 (5th Cir., 1965), certiorari denied 382 U.S. 907 (1965); *Schiemann* v. *Grace Line, Inc.*, 269 F. 2d 596 (2d Cir., 1959); *Latsko* v. *National Carloading Co.*, 192 F. 2d 905 (6th Cir., 1951); *Jones* v. *New York Central R. R.*, 182 F. 2d 326 (6th Cir., 1950); *Valentine* v. *South Coast Corp.*, 218 F. Supp. 148 (E.D. La., 1963); *Gloster* v. *Pennsylvania R. R.*, 214 F. Supp. 207 (W.D. Pa., 1963); *De Paola* v.

New York, New Haven & Hartford R. R. Co., 198 F. Supp. 12 (D. Conn., 1961); *Gaulden* v. *Southern Pac. Co.*, 78 F. Supp. 651 (N.D. Cal., 1948); *Aguirre* v. *Southern Pac. R. R.*, 43 Cal. Rept. 2d 73 (Ct. App. Cal., 1965).

V

Burlington Truck Lines Was a Wholly Independent Entity

There is also no merit in Petitioner's argument that the Burlington Truck Lines had existence in form only. In the absence of fraud, connivance or an undue domination, the law recognizes the separate entities of corporations, even though one owns the stock of the other. *Fawcett* v. *Missouri Pacific R. R. Co.*, 242 F. Supp. 675 (W.D. La., 1965), aff'd 347 F. 2d 233 (5th Cir., 1965), certiorari denied 382 U.S. 907 (1965); *Garrett* v. *Southern Ry. Co.*, 173 F. Supp. 915 (E.D. Tenn., 1959), aff'd 278 F. 2d 424 (6th Cir., 1960); *Gaulden* v. *Southern Pac. Ry.*, 78 F. Supp. 651 (N.D. Cal., 1948); *Kentucky Electric Power Co.* v. *Norton Coal Mining Co.*, 93 F. 2d 923 (6th Cir., 1938). There is nothing in the record in our case suggesting fraud or any collusive device. The Burlington Truck Lines was a wholly independent entity, serving the public generally over a far-flung territory, hiring and firing its own employees, paying its own taxes and expenses, carrying its own workmen's compensation insurance (T. 124, 125) and other insurance, owning its own equipment and controlling its own independent operations. It performed similar work in loading and unloading trailers in other places for various freight forwarders (T. 214-226).

We respectfully submit that the Petitioner has completely failed to present any reason why this Court, in the exercise of a sound judicial discretion, should allow a review of the decision and judgment of the Supreme Court of Missouri *en Banc* and that the writ should therefore be denied.

Respectfully submitted,

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